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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 917.

ALFRED SLIDELL, OLIVER BEIRNE, NICHOLAS H. RIGHTOR, ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES TSCHIRN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED AUGUST 6, 1883.

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A UNITED STATES OF AMERICA.

Circuit Court of the United States in and for the fifth judicial circuit and eastern district of Louisiana.

ALFRED SLIDELL et als.
vs.
CHARLES TSCHIRN. } No. 9989.

J. L. Bradford, esq., attorney for Alfred Slidell et als., plaintiffs, plaintiffs in error.

Rouse and Grant, attorneys for Charles Tschirn, defendant, defendant in error.

Writ of error, returnable to the Supreme Court of the United States on the second Monday of October, A. D. 1882.

1 UNITED STATES OF AMERICA.

Circuit Court of the United States for the fifth judicial circuit and eastern district of Louisiana.

ALFRED SLIDELL and others
vs.
CHARLES TSCHIRN. } No. 9989.

Petition.—Filed May 20th, 1882.

ALFRED SLIDELL et als.
vs.
CHARLES TSCHIRN.

To the Judges of the Circuit Court of the United States for the eastern district of Louisiana, in the fifth circuit.

Your petitioners, Alfred Slidell, residing in Paris, in the republic of France, a citizen of said republic:

Nicholas H. Rightor, of New Orleans, in the state of Louisiana, a citizen of said state:

Robert Lawes, of the parish of Assumption, in the state of
2 Louisana, a citizen of said state:

Marguerite Mathilde Slidell, wife of the Baron Emile d'Erlanger, residing in Paris, in the republic of France, and a citizen of said republic, herein joined and authorized by her said husband:

Marie Rosine Slidell, wife of Etienne Pierre Jacques Henri de Serres, count de Saint Roman, residing in Paris, in the republic of France, and a citizen of said republic, herein joined and authorized by her said husband:

Marie Marguerite Caroline Slidell, wife of Jacob Antoine Henry Leodegar Charles Louis Pfyffer de Heydegg, residing in Lucerne, in the republic of Switzerland, and a citizen of said republic, herein joined and authorized by her said husband:

Henry Clement Millaudon, of the parish of Point Coupee, in the state of Louisiana, a citizen of said state:

Benjamin L. Millaudon, of the parish of St. Bernard, in the state of Louisiana, a citizen of said state:

Jeanne Henrietta Millaudon, widow of Charles C. Gardanne, deceased, residing in New Orleans, in the state of Louisiana, and a citizen of said state:

3 Laurent Andre Burthe, residing in New Orleans, in the state of Louisiana, and a citizen of said state:

Josephine Pages, widow of Emanuel Burthe, residing in Liberty, in the state of Virginia, a citizen of said state, tutrix of and herein suing in behalf of the minors Estelle and Laurent Andre, issue of her marriage with the said Emanuel Burthe, deceased:

Thomas Butler, of the parish of West Feliciana, in the state of Louisiana, and a citizen of said state, tutor for and herein suing in behalf of the minors Louise, Robert, Edward and Marguerite, issue of the marriage of Marie Marguerite Burthe, deceased, with Robert O. Butler, deceased:

Genevieve Millaudon, wife of and herein joined and authorized by her husband, George Edmond Brown, residing with him at Breaux Bridge, in the parish of St. Martin, in the state of Louisiana, and a citizen of said state:

Louise Burthe, widow of Dominique F. Edmond Burthe, deceased, in her own right, and as tutrix of and herein suing in behalf of the minors Madaline, Elodie, Gabrielle, Edmond and Cecile, issue of her marriage with the said Dominique F. E. Burthe, deceased,

4 residing in New Orleans, in the state of Louisiana, and a citizen of said state:

Nicholas B. Trist, residing in New Orleans, in the state of Louisiana, and a citizen of said state:

Aglaé Bringier, wife of and herein joined and authorized by her husband, Benjamin Tureaud, residing with him in the parish of Ascension, in the state of Louisiana, and a citizen of said state:

Louiza Bringier, wife of and herein joined and authorized by her husband, Martin Gordon, jr., residing with him in New Orleans, Louisiana, and a citizen of said state:

Marius S. Bringier, of New Orleans, in the state of Louisiana, a citizen of said state:

Octavie Bringier, wife of and herein joined and authorized by her husband, Allen Thomas, residing with her said husband in Baton Rouge, in the parish of East Baton Rouge, in the state of Louisiana, and a citizen of said state:

Martin Duradon Bringier, residing in New Orleans, in the state of Louisiana, and a citizen of said state, herein suing in his own right and as tutor of the minor Myrthé Taylor:

5 Louise Taylor, residing in New Orleans, in the state of Louisiana, and a citizen of said state:

Bettie Taylor, wife of and herein joined and authorized by her

husband, Walter Stauffer, residing with her said husband in New Orleans, in the state of Louisiana, and a citizen of said state:

Nicholas P. Trist, residing in the parish of St. James, in the state of Louisiana, and a citizen of said state:

Wilhelmine Trist, wife of and herein joined and authorized by her husband, Robert C. Wood, residing with him in New Orleans, in the state of Louisiana, and a citizen of said state:

Oliver Beirne, residing in Monroe county, in the state of West Virginia, and a citizen of said state, herein suing as sole testamentary executor of the estate of John Burnside, deceased, and as his universal legatee; and Duncan F. Kenner, residing in New Orleans, in the state of Louisiana, and a citizen of said state:

Bring this their petition against—

Charles Tschirn, residing in the parish of Livingston, state of Louisiana, and a citizen of said state.

6 And thereupon your petitioners declare and say—

That in the year 1776, on the 9th day of September, at a time when Spain was in the possession as sovereign of the province of Louisiana, embracing a portion of the present state of Louisiana lying east of the river Mississippi and south of the Iberville river, (now called the bayou Manchac and the Amite river,) and of the lakes Maurepas and Pontchartrain, exercising therein the rights, powers, and attributes of a sovereign and owner of said territory, Maurice Conway, an inhabitant of said territory, at New Orleans, made his certain claim, petition, or demand, addressed to Don Louis Unyaga y Amezaga, then military and political governor of said city of New Orleans and province of Louisiana, praying said governor to grant him all the back lands particularly set forth and described in said petition, as by the said petition when produced will appear, and that he would appoint Lewis Andry to place him, the said Maurice Conway, in possession of said land, and to survey the same and fix the boundaries thereof, and to do further acts and things

7 usual and needful in the premises.

That afterwards, to wit, on the 27th of said month of September, 1776, the said political and military governor made his order directing the said Lewis Andry to go to the land applied for, and to place the applicant, said Maurice Conway, in possession of the same, if vacant, and if no injury would result to any of the adjoining inhabitants; to establish the boundaries of said land and to make to him, the said governor, a proces verbal, or return of his proceedings, in order that he might issue to the said Maurice Conway a complete title for the land so petitioned for and surveyed, as by the said order of said governor, when produced, will appear.

8 That afterwards, to wit, on the 1st day of October, 1776, or thereabouts, the said Lewis Andry proceeded to the land described in the said petition of the said Maurice Conway, and in the order of the said governor; and there, in obedience to said order and as prayed for in said petition, did survey and establish the bound-

aries of said land, and did place the petitioner, the said Mau-
9 rice Conway, in possession of the same, and did grant and make his certificate or proces verbal of his said proceedings, signed by him and by the said Maurice Conway and Don Louis Judice, the commander of the district of Lafourche, which proces verbal of his said proceedings he afterwards returned to the said military and political governor; all of which by the said proces verbal, when produced, will appear.

That afterwards, to wit, on the 21st day of the month of June, in the year 1777, Don Bernado de Galvez, then governor ad interim and intendant of said province of Louisiana, made and delivered to the said Maurice Conway his complete grant in the name and by the authority of the king of Spain, of the land so surveyed, and whose boundaries had been by the said Lewis Andry established as aforesaid, and of which the possession had been given to the said Maurice Conway; the said grant vesting in the said Conway an estate of inheritance and fee-simple in all the lands therein described, without condition or reservation, and without requiring any other act or thing to be done by the said Conway before the full, final, and
10 complete vesting in him of said estate of inheritance in said lands; all of which by the said instrument of grant, when produced, will appear.

That by the survey of the boundaries of said land by the said Louis Andry it appeared that the same was situated on the left bank of the Mississippi river, in descending the same, about 24 leagues above the town of New Orleans, in the then district of Lafourche, with a front on said stream of 96 lineal arpents, and that the upper side line extended from said river into the interior of the country on a compass direction of north 50° west; the lower side line in like manner extended from the said river into the interior of the country on a compass direction of north 70° east, and both of said lines diverging, in consequence, towards the rear, with an angle of 120° between the same, and that said side lines were not actually run out, measured, and marked upon the ground further into the interior than the distance of 42 lineal arpents from said river, where posts or bournes were set by said Andry, which with similar posts or bournes also set by him on each of said side lines near the
11 said river would serve to fix the course of said lines into the interior whenever it might suit the convenience or interests of said Maurice Conway so to extend the same. That all this was done in conformity with the usages and customs and under the circumstances of necessity of said province, and was not intended in any manner to limit or control the extent of the said lands to the rear and into the interior, but, on the contrary, to give to the same an extent towards the rear and into the interior, upon the prolongation of the said side lines as far as the jurisdiction and power of said governor to grant the domain lands extended.

That at the times when the foregoing proceedings took place, and immediately before and after the same, the territorial limits of said

province of Louisiana, in that vicinity, extended northward to the water boundary formed by the Iberville river and the chain of lakes and their connections now known as lake Maurepas, lake Ponchartrain, and lake Borgne, the said Iberville river, as then known, being the connecting link or arm between the Mississippi river and the lake Maurepas, now known as pass or bayou Manchac and Amite river.

That, therefore, the said grant of land so made by the authorities of Spain, in said province, to the said Maurice Conway, extended, and was so intended to extend along the Mississippi river, with a front thereon, as stated, of ninety-six lineal arpents, or about three and a half miles, and in depth, between the side lines as heretofore described, from the said river, to the said Iberville river and the said lake Maurepas.

And your petitioners further show:

That under and by virtue of said petition made by the said Maurice Conway to said military and political governor, Don Louis Unzaga y Amezaga, and said order to survey said land and place the petitioner in possession thereof, and the survey and putting into possession thereof by said Andry, and the said proces verbal or return made by said Andry to the said governor ad interim, showing
12 all he had done in the premises, and especially under and by virtue of said grant or complete title made by the said governor *ad interim*, on said 21st day of June, 1777, the said Maurice Conway became vested, under the laws, usages, and customs then in force in said province of Louisiana, of an estate of inheritance and fee-simple in the lands described in said instruments of title, absolutely, and without condition and with full right and authority to use and enjoy the same as his property.

That by the third article of the treaty between Spain and France, concluded at Saint Il Defonso on the first of October, 1800, the former sovereign ceded to the latter the province of Louisiana, with limits embracing the lands granted to Maurice Conway as aforesaid, and by the first article of the treaty between the republic of France and the United States, concluded at Paris on the 30th day of April, 1803, the said province, with the same limits, was ceded to the United States, who took possession of the portion of the same embracing the now state of Louisiana, at New Orleans, on the 20th Decem-
13 ber, 1803.

That under an act of Congress approved on the 31st of October, 1803, the President of the United States appointed Wm. C. C. Claiborne to be military and political governor of said province, and while he was in the exercise of his powers and duties as such, Wm. Donaldson addressed to him a petition, setting forth the grant of land to Maurice Conway, as heretofore set forth by your petitioners, and that the same then belonged to him, the petitioner, Wm. Marenner, and Patrick Conway; that they were desirous that the whole grant should be surveyed, and its lines marked, in order to avoid any interference with the proprietors of the neigh-

boring grants, and expensive disputes, *et cetera;* and praying that said governor would permit the said Wm. Marenner, or some other fit person, to survey the said tract and mark the boundaries thereof, and that the surveyor should be protected by the military power of the province while making said survey, as will from said petition, when produced, more fully appear.

That the said governor thereupon authorized said survey
14 of said grant, and directed the commandant of the district to extend to the surveyor his protection, if necessary; as will from the said instrument of license or permit, when produced, more fully appear.

That in pursuance of said license or order, the whole of said grant was surveyed and its out boundaries determined and marked upon the ground, the upper side line thereof being extended to the bayou Manchac, or ancient Iberville river, in the course of the first 42 arpents thereof, as surveyed by Don Louis Andry in the year 1776; and the lower side line in like manner extended to the lake Maurepas, in the course of its first 42 arpents, as likewise surveyed by said Andry in said year 1776. That said grant or tract of land having then passed by certain sales and other lawful modes of transfer from said grantee, Maurice Conway, to divers persons, the same was, under the said order or license of said Governor William C. C. Claiborne, further divided and surveyed into three distinct and separate parcels, with different fronts or extents on said Mississippi river, and all of them extending into the rear or interior, respectively,
15 to the bayou Manchac, Iberville river, and lake Maurepas.

That on the 20th February, 1806, the said Lafon made his certain plat and certificate of survey, testifying that he had, together with one Andry, both acting under said license or order of said Governor Claiborne, in the month of December, 1803, or the month of March, 1804, surveyed in favor of one William Conway the lower portion of said grant, being 27 arpents thereof front on the Mississippi river, and extending by diverging side lines to the Amite river and the lake Maurepas; and that the upper side line extended from said Mississippi river on a course N. 9° 15′ E. to the said Amite river, the distance of 351 lineal arpents, and the lower side line from the said Mississippi river on a course N. 70° 00′ E. to the said lake Maurepas, the distance of 455 lineal arpents; all of which will the more fully by said plat and certificate, when produced, appear.

16 And your petitioners further show:

That on the 2d of March, 1805, an act of Congress was approved entitled "An act for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana," under the provisions of which a board of commissioners was in due time organized in said territory of Orleans, which embraced the lands heretofore described, with power to receive notices of claims, and the evidence in support thereof, to lands within said territory, to inquire into, examine, and investigate the same, and to decide thereupon according to justice and equity.

That under the 4th section of the said act, persons claiming land by virtue of any complete and perfect grant made before the 1st October, 1800, were allowed, if they saw fit, and persons claiming land under imperfect or incomplete grants were required to file before the register of the proper district, before the 1st day of March, 1806, notices in writing, stating the nature and extent of their claims, together with plats of the lands so claimed, and before that day to deliver to said register, for the purpose of being recorded,
17 every grant, order of survey, deed, conveyance, or other written evidence of their said claims.

That in order to enforce obedience to this act, and to induce the inhabitants to exhibit and record their said claims and evidence in support thereof, the 4th section of said act denounced certain penalties and forfeitures against said inhabitants in case of failure so to present their claims and evidence.

That by the 5th section thereof it was made the duty of the said board of commissioners, through their clerk, to prepare two transcripts from the books in which all their decisions were directed to be entered, of the favorable decisions upon claims, one of which transcripts was to be filed with the officer exercising in the district the authority of surveyor general and the other to be sent to the secretary of the treasury, to be by him submitted to Congress for its determination thereon, at their next ensuing meeting after he should have received the same. And said act authorized a majority of said board of commissioners to make favorable decisions upon claims filed before them, and provided that said board should con-
18 sist of three persons, by reason of which your orators aver that any two were authorized to make said favorable decisions.

And your petitioners further show:

That on or about the 28th day of February, 1806, William Conway filed his notice of claim, as owner under certain conveyances from Maurice Conway, before the said board of commissioners, with the evidence in support thereof, to a tract of land, being a portion of that granted by Spain to Maurice Conway on the 21st June, 1777, having a front on the Mississippi river of 22½ arpents, the upper side line running N. 9° 15′ E. 351 lineal arpents, and the lower side line running N. 70° E. 455 lineal arpents, and both opening or diverging towards the rear 60°, bounded above by the lands of Daniel Clark, and below by the lands of Simon Laneau; as will, by said notice of claim and plat, and other evidence in support thereof,
19 when produced, more fully appear.

That said board of commissioners took said claim into consideration, and on or about the 3d day of March, 1806, made their favorable decision thereon, which is known as favorable decision No. 125, in their abstract of favorable decisions, and is in the words and figures following, to wit:

"No. 125. William Conway claims a tract of land situate in the county of Acadia, at a place called Houmas, on the left bank of the Mississippi, containing 22½ arpents in front, with an opening

towards the rear of 60° 45′, the upper line running north 9° 15′ east 351 arpents, and the lower line directed north 70° east and measuring 455 arpents, bounded on the upper side by Daniel Clark's land, and on the lower by the land of Simon Laneau

"It appearing to the board, from a patent or complete title exhibited, that 17 arpents of front were, together with a greater quantity, granted by the Spanish government to Maurice Conway 21st June, 1777, and it appearing that the 5½ arpents of front remaining of the land aforesaid were purchased by Pierre Part at the public sale of the estate of the late Joachim Miro (alias Belony) on the 7th day of December, 1788; and it further appearing to the board, from the several instruments of conveyance offered in testimony, that
20 the two tracts of land aforesaid have been conveyed to the present claimant, the board do hereby confirm his claim aforesaid."

That said decision recognized the said grant made to said Maurice Conway as a complete and perfect grant, obligatory and binding upon the United States as successor of France and Spain in the province of Louisiana, under the treaty of Paris aforesaid, which decision being that of a special tribunal upon a subject-matter within its jurisdiction, was subject to no appeal, reversal, or modification whatsoever, save by the final action of Congress thereon. That by the 5th section of said act of Congress of March 2, 1805, said decision was directed to be laid before Congress for its final action thereon, which was done by the secretary of the treasury on the 9th day of January, 1812, with a large number of other favorable decisions on
21 land claims rendered by the commissioners aforesaid.

That under the 2d and 3d articles of the treaty of 30th of April, 1803, whereby the United States acquired the province of Louisiana, the constitution and laws of the United States and the principles of equity and justice, it was forbidden to the United States to sell or dispose of, save by the law of the land, pending the decision of the Congress thereon, lands embraced in the favorable decisions aforesaid.

That in full recognition of this want of authority and of the obligation under the treaty aforesaid to protect the inhabitants in the enjoyment of their property, an act of Congress was approved on the 3d day of March, 1811, providing for the survey and sale of the public lands generally in the territory of Orleans, then embracing the grant made to Maurice Conway, whose 6th section con-
22 tained this pledge: "*And provided, also*, That till after the final decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been, in due time and according to law, presented to the register of the land office, and filed in his office, for the purpose of being investigated by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the territory of Orleans, or which shall have been located by or for Major-General Lafayette, according to law." That the claim of William Conway having been so presented to the commissioners for

the eastern district of the said territory of Orleans, and having been decided favorably by said commissioners, the lands so claimed were beyond the lawful power of sale or disposition, save by the laws of the land, either by Congress or any officer or authority acting under its direction, and that this absolute want and absence of all authority so to dispose of said lands, or any part thereof, continued without alteration until the full and final action by the said Congress upon the said claim.

23 That by an act of Congress approved the 18th April, 1814, entitled "An act concerning certificates of confirmation of claims to lands in the state of Louisiana," the final action of Congress upon said favorable decision of said board of commissioners upon said claim of William Conway was probably pronounced, ratifying and approving the same, and providing means and measures for the granting a patent for the same under the laws of the United States.

And your petitioners further show: That on or about the same time when the said William Conway presented to the said board of commissioners his own claim for a portion of said grant to Maurice Conway, being 22½ arpents front thereof, and being the lower portion of said grant on the river Mississippi, Daniel Clark also presented his claim before said commissioners for another portion of said grant, having 20 arpents of front on said river, and being immediately above the said 22½ arpents of said William Conway, and that William Donaldson and John W. Scott jointly presented their claim to another portion of said grant, containing 29 arpents in front on the same river, and being the uppermost part of said grant on said river. And that about the same time that said commissioners

24 made their favorable decision on said claim of William Conway they in like manner rendered favorable decisions upon said claims respectively of the said Daniel Clark and of the said Donaldson and Scott.

That in due time the surveying department of the government of the United States was organized in the state of Louisiana, which state had been admitted into the Union, with limits embracing the lands granted to Maurice Conway, and on the 14th of January, 1829, at Washington, Mississippi, James P. Turner, then surveyor of the public lands south of Tennessee, exercising in Louisiana the powers and duties of surveyor general therein, wrote to his immediate superior in office, George Graham, the commissioner of the general land office, telling how he thought the Houmas claim should be surveyed, and asking instructions in the matter. The said grant to Maurice Conway being then and since generally called the Houmas claim or Houmas grant.

25 That on the 17th of February, 1829, the said Geo. Graham wrote to the said Turner telling him, for reasons stated, to survey the grant in such a manner as to give it a depth extending out from the Mississippi river equal to a league and a half only, and not to survey it as extending to the depths claimed for the different subdivisions thereof before the board of commissioners, and according to

the favorable decisions of said commissioners, as heretofore set forth; all of which by the said letters of the said James P. Turner and of the said George Graham, when produced, will appear.

That accordingly the said James P. Turner surveyed, or caused to be surveyed by his lawful deputies, the said subdivisions of said Houmas claim, as directed by the said commissioner of the general land office, which survey adopted and perpetuated for distances of 120 arpents from the Mississippi river the upper and lower side lines of the grant to Maurice Conway as they had been run and established by Louis Andry in 1776, to the distance of 42 arpents, and by Lafon,
Andry, and Marenner in 1803, 1804, and 1805, to the Amite
26 river and lake Maurepas respectively.

And the side lines having been so terminated at 120 lineal arpents from the river, instead of a league and a half, as directed by said George Graham, which are equal to 126 lineal arpents, the difference being six lineal arpents or nearly a quarter of a mile, the rear line corresponding to that depth was surveyed and fixed so as to be throughout all its parts 120 arpents distant from the water front, the said Mississippi river. That about the same time the said Turner, or his deputies, also surveyed and fixed another back line to the three divisions or parts of the said grant to Maurice Conway, by running a waving line parallel to and 42 arpents from the Mississippi river, uniting the corners or posts set by Andry in 1776, on the side lines, which, as has been shown, were set by him at said distance of 42 lineal arpents.

That by these operations the officers of the surveying department admitted and recognized the titles of the said Wm. Conway, Daniel Clark, and Donaldson and Scott as legal representatives of
the Spanish grantee, Maurice Conway, only to the extent of 42
27 arpents in depth from the Mississippi river, and the residue of said grant, lying back of and in the rear of the said 42 arpent line, and between it and the Amite river and the lake Maurepas, was held and claimed as public land of the United States, acquired as vacant land under the first article of the treaty of Paris of 30th of April, 1803; the portion thereof situate between said 42 arpent line and said league and a half line being reserved by said officers from further immediate survey, as debatable ground, upon which the rights of the claimants or the United States might finally attach and operate according to the decision of the courts, which tribunals, as stated by the said George Graham in his instructions to the said Turner, of 17th February, 1829, were alone competent to decide the question whether said land was private property or public land.

That from that time to the present time the United States have maintained and from time to time asserted, by sales, pre-emption entries, grants to the state of Louisiana, and other hostile pretensions,
their right as proprietors under the treaty aforesaid, to all
28 the land within the Houmas grant, as heretofore described, lying behind and back of the line surveyed under the authority aforesaid, at the distance of 42 lineal arpents from the Mississippi

river. That soon after the instructions of the commissioner of the general land office to the surveyor general, Turner, above referred to, nearly the whole of the lands in the said Houmas grant, situated back of the league and a half line, were surveyed by the United States as public lands of the same, and divided into townships, ranges and sections, under their system provided for the rectangular surveys of their public domain. That all of said back land situate in the divisions of said claim, known as the Daniel Clark and Donaldson and Scott divisions, were so surveyed and divided into sections, townships and ranges about the years 1829 and 1830, and a very large part of said land situated in the William Conway claim was
29 about the same time and has been within the last three years so surveyed into sections, townships and ranges.

That many thousands of acres of the said back land in the said Clark and Donaldson and Scott divisions of said grant, having been sold before and during the year 1836, and it appearing that the whole of said land of any value would soon be so disposed of by the United States, J. S. Preston, an owner of a part of said lands, appealed to R. C. Nicholas, then a member of the United States Senate from Louisiana, to induce the United States to desist from such actions on the part of its officers, who, on the 16th June, 1836, wrote to Ethan A. Brown, then commissioner of the general land office, enclosing to him the letter of the said J. S. Preston; that on the following day, to wit, the 17th June, 1836, the said commissioner wrote the said senator, R. C. Nicholas, admitting that the sales complained of were illegal and made in violation of law, being of lands embraced in a private claim filed before the commissioners for investigation, and not then finally acted on by Congress, and saying he had directed the land officers at New Orleans to cease said sales and to tell him
30 what lands had been sold, in order that patents for the same might not be issued. That, accordingly, the said Ethan A. Brown, commissioner as aforesaid, wrote to the register at New Orleans on said 17th June, 1836, telling him that, although he could not recognize the Houmas claim as valid to the whole extent claimed before the board of commissioners, yet as the law had prohibited the sale of any land so claimed pending final action of Congress upon the claim thereto, the sales already made in the claimed limits of the Houmas grant were illegal, and that no further claims should be allowed, as all of which will, when said letters are produced, the more fully appear.

That on the 2d day of December, 1837, M. Birchard, then solicitor of the general land office, to whom the commissioner thereof had referred for his opinion and report certain papers relating to the Houmas grant, made his written report to said commis-
31 sioner, James Whitcomb, in which he reviewed at great length the facts and law of the same, and gave an equivocal opinion on the same and hostile thereto, recommending that said commissioner should refer the whole matter to Congress for decision. The said commissioner, on the 3rd of April, 1839, wrote to his superior,

Levi Woodbury, secretary of the treasury, stating the number of sales made in the Houmas claim, the controversy between the claimants thereunder and the settlers who had made purchases of said lands, submitting to him a copy of the solicitor's opinion of December 2, 1837, aforesaid, and asking his instructions or those of the attorney general what he should do in the premises. That said secretary of the treasury referred the matter to the attorney general, who, on the 6th of May, 1839, advised him "that Congress alone possessed the power to make a fair and just disposition of the subject in controversy; that much public mischief might arise
32 should the executive branch of the government proceed to act at that time, and that Congress should be applied to at an early day in the next session to take such measures as justice to the respective parties might demand." That the matter was laid before Congress at its next session, but that body took no action thereon at such session, and consequently the commissioner of the general land office, on the 3d October, 1840, again applied to the secretary of the treasury for instructions, setting forth the absolute necessity of some action, but suggesting, as but a short time would elapse before another meeting of Congress, if it would not be better to defer action until that body would have another opportunity to legislate upon the subject. That said secretary wrote said commissioner on October 31st, 1840, concurring in his opinion that nothing should be done until Congress should have further opportunity for legislative action.

That in this state of uncertainty and indecision on the part of
33 the executive officers of the government the then proprietors of the Houmas claim determined to apply to the United States to issue patents upon the three subdivisions of the same.

That accordingly, some time before the 13th of February, 1841, A. F. Rightor, at New Orleans, having a large interest in the William Conway claim, made application to J. Genois, register of the United States land office there, and whose duty it was, under the law applicable to such cases, to issue such instruments of title, for his patent certificate on said claim, and also for such certificate on each of the two other claims composing the said Houmas grant, viz., that of Daniel Clark and that of Donaldson and Scott.

That said register declined to issue any of said certificates, and on said 13th February, 1841, wrote to James Whitcomb, then the commissioner of the general land office, Washington city, laying before him the facts of the said application and his reasons for declining the certificate, and asking that he be instructed how to proceed.

That on the 30th June, 1841, the said commissioner instructed the said register to defer action until definitely instructed on the subject by the department.

34 That on the 6th May, 1836, the surveyor general of Louisiana had approved a patent or particular plat of the claim of William Conway, made in pursuance of a survey thereof, under the authority of the United States, and which recognized said claim, as laid before the commissioners in 1806, extending to the Amite river

and the lake Maurepas, and it is believed by your orators that such plat was filed before the register by the said A. F. Rightor when he demanded a patent certificate upon said claim of William Conway, aforesaid.

That on the 9th of August, 1841, at Washington city, Isaac T. Preston, acting for the parties in interest, addressed a letter to the commissioner of the general land office, in which, after stating the facts and the law of the William Conway claim, he made application for a patent thereon, by virtue of the confirmation of said claim by the act of 18th April, 1814, aforesaid, in which application he reminded said commissioner of the great injustice which had been visited upon the two claims of Daniel Clark and Donaldson and Scott by the sale of the lands embraced by the same, and prayed that the said patent might issue upon said Conway claim
35 before sales had been made therein, and controversies and conflictions of interest should be produced thereby.

That the foregoing application by the said Preston for a patent on the said claim of William Conway, it seems, was referred by the said commissioners, with voluminous documents accompanying the same, to Charles Hopkins, then solicitor of the general land office, who took the same under consideration, and on the 30th of September, 1841, wrote an able report to E. M. Huntington, the commissioner of the general land office, in which he advised the said claim had been confirmed by the act of 18th April, 1814, to the whole extent claimed before the commissioners, and that a patent should issue accordingly.

That the said report of said solicitor, with a large number of documents, maps, et cetera, relating to the subject, together with a statement of all that had been done in and about the premises by
36 Congress and the executive officers of the United States, was, by letter of the 14th February, 1842, from the commissioner of the general land office, E. M. Huntington, submitted to Walter Forward, then secretary of the treasury, with the request that said officer would submit the subject to the attorney general, and afterward instruct him, the said commissioner, upon certain propositions of law therein stated, adding that the decision sought would also determine executive action upon the other two branches of the Houmas grant, meaning the claim of Daniel Clark and the claim of Donaldson and Scott.

That before any opinion of the attorney general was given, the secretary of the treasury, on the 2d of August, 1842, returned the papers to the successor of said commissioner, Thomas H. Blake, for a statement of facts, and that by letter of 9th August, 1842, said Blake wrote McC. Young, then secretary of the treasury, giving at length the statement of facts called for. That these being
37 submitted by the said secretary to the attorney general, that officer, on the 16th August, 1842, wrote to the said commissioner propounding certain questions relating to the practice of the general land office in issuing patents on claims, and that on the said

16th August said commissioner wrote the said attorney general giving the information required.

That on the 2d September, 1842, the attorney general wrote the secretary of the treasury that there could be no doubt all the sales of land within the claimed limits of the Houmas grant were null and void *ab initio* as made in violation of the sixth section of the act of March 3d, 1811, advising that no more patents be issued on said sales, and that as to those already issued the remedy was with the courts. That said officer did not then or afterwards express his opinion upon the other points submitted to him, especially the point whether or not said claim had been confirmed by the act of 18th April, 1814.

That on the 7th October, 1842, the said commissioner of the general land office wrote to the surveyor general of Louisiana,
28 telling him he was not authorized, by approving a survey of the William Conway claim, to decide upon its extent or boundaries until those matters had been decided by the proper authorities; that such claim was before the attorney general, and that until he decided it the said surveyor general had no authority to proceed in the premises.

That on the 30th January, 1843, the register at New Orleans issued his patent certificates on the claim of Daniel Clark and the claim of Donaldson and Scott, testifying that said claims had been confirmed by the act of 18th of April, 1814, and that the interested parties were entitled to patents from the United States in the names of the said confirmees.

That on the 10th of February, 1843, the commissioner of the general land office wrote to said register rebuking him for issuing said muniments of title, and directing him to recall the same, saying that the whole question as to the confirmation and limits of the Houmas titles had been submitted to the supervisory power, and had not then been definitely settled.

That on the 15th November, 1843, the secretary of the
39 treasury wrote to Samuel D. King, an attorney for parties then owning portions of the Houmas grant, declaring that he had not determined, nor would he determine, to what extent the said grant had been confirmed, and informing the said King that that question was for the courts of law or for Congress to decide, and on the 1st March, 1844, the commissioner of the general land office wrote to William R. King, a member of the United States Senate, telling him that the executive officers had uniformly declined to issue patents upon any of the portions of the Houmas claim, and would continue to refuse so to do until Congress or the courts should settle the fact and extent of the confirmations of said portions.

That on the 28th May, 1844, W. C. Johnson, at Wash-
40 ington city, therein acting as attorney for owners of the two divisions of the Houmas grant confirmed to Daniel Clark and to Donaldson and Scott, made formal application to the commis-

sioner of the general land office for patents on the same, which said application was, on the same day and by the same commissioner, referred to his official superior, the secretary of the treasury *ad interim*, McClintock Young.

And your petitioners further show that finally the secretary of the treasury, George M. Bibb, on the 12th August, 1844, wrote to the commissioner of the general land office, Thomas H. Blake, an opinion, in which he reviewed the whole history of the Houmas land grant, and made his final decision thereon, holding that the portions thereof claimed before the land commissioners in 1806 by William Conway, Daniel Clark, and by Donaldson and Scott, had been confirmed to them respectively by the act of 18th April, 1814, and to the full extent to which said claims were preferred before said commissioners, and that the applications for the patents on said Donaldson and Scott and said Daniel Clark divisions, then before him for decision, ought to be granted and the patents issued.

That on the 22d of August, 1844, the patents of the United States were accordingly issued and delivered for said Daniel Clark and Donaldson and Scott parts of the Houmas grant, thereby termi-
41 nating all power and authority over said claims on the part of the executive department of the government of the United States.

That on October 24th, 1844, the commissioner of the general land office wrote the surveyor general of Louisiana, informing him the secretary of the treasury had decided the Houmas claims confirmed and entitled to patents; that patents had issued on two of them, and instructing said officer to prepare and send to the register of the land office at New Orleans a special or patent plat of the unpatented claim, viz., the claim of William Conway; and on the same day the said commissioner wrote said register, informing him of the same facts and proceedings, and intimating that it was then lawful and regular for him to issue a patent certificate upon said claim. That accordingly, on the 25th November, 1844, the said surveyor general certified a patent or special plat of said claim of William Con-
42 way in order that said register might issue thereon his patent certificate, whereby it appeared that said claim or tract of land, as claimed by William Conway in 1806, before the board of commissioners, by whom the same had been confirmed under the No. 125, contained the superficial quantity of 123,519.90 acres of land.

And afterwards the said register made and issued his patent certificate in favor of the said William Conway claim, thereby testifying it had been confirmed by the act of 18th April, 1814, and was entitled to a patent, according to the plat aforesaid, approved by the said surveyor general on the 25th November, 1844. That on the 23d September, 1844, Isaac T. Preston, and on the 19th October, 1844, W. C. Johnson, as agents or attorneys for owners of land within the said William Conway claim, made formal application to the commissioner of the general land office, asking that a patent for
43 the same might issue, and your petitioners know of no reason why such patent would not have issued in due course had not

the Congress of the United States interfered, and by a resolution of the United States Senate, passed on the 10th December, 1844, and put in issue the power of the executive branch of the government to have issued the patents on the said claims of Daniel Clark and of Donaldson and Scott, and calling upon the secretary of the treasury for full reports of all he had done or caused to be done in the premises, with copies of all arguments, decisions, maps, certificates, surveys, entries,, et cetera, in any manner applicable to the Houmas controversy. That the practical effect of such action by the Senate of the United States was to deter the executive officers thereof from issuing at that time the patent upon the William Conway claim, though such officers, as has been shown, were satisfied it was their duty to do so, and that it was the right of the parties in interest to receive the same.

That, in obedience to the said resolution of said Senate, the secretary of the treasury did, on the 8th of January, 1845, write to the president of said Senate, sending that body a lengthy report,
44 giving the information called for, which report was subsequently printed, and is known as Senate doc. No. 45, of the second session of the 28th Congress, and contains a great portion of the official letters, decisions, plats, certificates, et cetera, heretofore referred to, and constituting in great measure the title of your petitioners to the lands hereafter to be more particularly described.

That on the 7th January, 1845, a joint resolution was passed by the House of Representatives of the United States, to wit: "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the issuance of grants or other evidences of title upon a Spanish land claim in the state of Louisiana, lying on the Mississippi above New Orleans, commonly known as the Houmas claim, be, and the same are hereby, prohibited until the further order of Congress in relation thereto." That said resolution failed to pass the Senate for want of time at that session, but, with the resolution of said Senate aforesaid of
45 the 10th and 19th December, 1844, it had the effect to induce the commissioner of the general land office thereafter to refuse to issue a patent on the William Conway claim, though specially requested to do so by the President of the United States, as your orators will show.

That on March 3d, 1845, the owners of the Conway claim wrote to the President, requesting him to direct the commissioner of the general land office to do his duty and furnish them the proper evidence of their title, as the same had been furnished to the owners of the other portions of the Houmas grant, sending the President a note of the same date from the secretary of the treasury, in which said secretary stated that the three claims "are confirmed, and therefore patents ought to issue, if not already issued, conformably to the opinion" delivered by him.

That, in answer to this request, the said President, on the same day, gave to the applicants an order, addressed to the said commis-

sioner, telling him to "issue patents in conformity with the
46 above recommendation and opinion of the secretary of the treasury," but the said commissioner still persisted in his refusal so to do.

That on the 12th May, 1845, Isaac T. Preston, as counsel for the owners of said William Conway claim, again made application for a patent thereon, to James Shields, the then commissioner of the general land office, who, on the 24th June following, submitted the same, with a report to his immediate official superior, Robert J. Walker, secretary of the treasury, and asked his instructions in the premises, which instructions the said secretary failed or declined to give.

That on 26th June, 1846, the Senate and House of Representatives passed a joint resolution, in the words and figures following, to wit: "That the attorney general of the United States be, and is hereby, directed to examine the evidences of title in the case of a certain Spanish land claim in the state of Louisiana, lying on the Mississippi above New Orleans, commonly known as the Houmas claim, and to report his opinion thereon to the President of the
47 United States, and if, in the opinion of the attorney general, any patent or patents issued, or which may be issued under such claim, shall have been or shall be used contrary to law, that the President of the United States be, and is hereby, requested to cause proceedings to be instituted in behalf of the United States, and to have the validity of such patent or patents judicially determined."

That in compliance with said joint resolution, Nathan Clifford, the attorney general of the United States, on the 31st December, 1847, sent to the President his opinion and report, in which he reviewed at great length the material facts and the law of the Houmas controversy, concluding, and so advising the said President, that the Houmas claim had not been confirmed by any act of Congress; that the patent certificates, patent plats, patents, and other evidences of title issued thereon were utterly null and void, as issued without authority of law, and advising, finally, that the grant made in 1777 to Maurice Conway was a complete, valid grant, protected by the treaty of Paris of the 30th April, 1803, but only to the depth of 42 lineal arpents from the Mississippi river, and no more, and
48 that all the lands within the claimed limits of said grant, situated farther from said river than 42 lineal arpents, were the public lands of the United States, acquired by them as vacant lands under the treaty aforesaid. That in due course, and in accordance with the foregoing opinion and report of the said attorney general, the President of the United States, some time in the year 1849, instructed the attorney of the United States for the district of Louisiana at New Orleans to institute suits in this honorable court, and on the equity side thereof, against Daniel Clark, or his legal representatives, and Donaldson and Scott, or their legal representatives, to have the patents issued to them respectively on the 22d August, 1844,

judicially annulled and cancelled, and the lands therein conveyed declared to be the property of the United States unaffected by said patents.

That on the 22d of November, 1856, a decree was rendered in one of the said suits, No. 1814, against said Daniel Clark and others, declaring said patent inoperative, as having issued without authority of law, and directing that within thirty days after notice of
49 said decree the defendants should surrender the same for cancellation.

That said notice was never given, and has not been given to this day, and said patents remain still outstanding. That no decree was ever rendered or made in the said suit against Donaldson and Scott, No. 1815, and the same is now at issue and stands ready for argument in this court.

And your orators further show: That on the 2d of June, 1858, there was approved an act of Congress entitled "An act to provide for the location of certain confirmed private land claims in the state of Missouri, and for other purposes," whose second section is in the words and figures following, that is to say:

"That the decisions in favor of land claimants made by P. Grimes, Joshua Lewis, and Thomas B. Robertson, commissioners appointed to adjust private land claims in the eastern district of the territory of Orleans, communicated to the House of Representatives by the secretary of the treasury on the ninth day of January, one thou-
50 sand eight hundred and twelve, and which is [are] found in the American State Papers, Public Lands, (Duff Green's edition,) volume two, from page two hundred and twenty-four to three hundred and sixty-seven inclusive, be and the same are hereby confirmed, saving and reserving, however, to all adverse claimants the right to assert the validity of their claims in a court or courts of justice.

"*Provided, however*, That any claim so recommended for confirmation, but which may have been rejected in whole or in part by any subsequent board of commissioners, be and the same is hereby specially excepted from confirmation."

That said second section acted upon and was intended to act upon and affirm in all things the decision, No. 125, in favor of the claim of William Conway, made on the 3d day of March, 1806, by the board of commissioners for the eastern district of the territory of Orleans, if the same had not been so affirmed and approved by
51 the act of 18th April, 1814, and that said section recognized in favor of said William Conway and all persons lawfully deducing title under him a full, clear, and indefeasible estate in fee-simple in all and every portion of the lands claimed by said Conway before said commissioners, and vested in them all title, claim, right or interest whatsoever which the United States had, or might have, or claim by virtue of the treaty of cession by which they acquired the province of Louisiana.

That on the 3d March, 1859, the Congress of the United States

passed a joint resolution suspending until the next Congress the said second section of said act of June 2d, 1858, and declaring that in the meantime "no patent or patents shall be issued, nor shall any action be had by the executive branch or department of the government, or any officer or agent thereof, under or by virtue of said section."

That on the 21st June, 1860, there was approved another act of the said Congress which is in the words and figures following, to wit:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the second section of an act passed the 2d day of June, one thousand eight hundred and fifty-eight, entitled 'An act to provide for the location of certain confirmed private land claims in the state of Missouri, and for
52 other purposes,' and all other parts of said act which relate to lands in Louisiana, confirmed by said second section, (so far as said lands are concerned,) be and the same are hereby repealed.

"SEC. 2. *And be it further enacted*, That Congress hereby refuses to confirm to the claimants under the Houmas grant the lands embraced in certificates number one hundred and twenty-five to William Conway, number one hundred and twenty-seven to Daniel Clark, and number one hundred and thirty-three to Donaldson and Scott."

Now, your petitioners show that said act, in so far as it purports to repeal said second section of said act of June 2d, 1858, and by force of said repeal to revoke and cancel the grant thereby made to or recognized in favor of your petitioners, or those under whom they deduce their right, was and is an exercise of power by the
53 legislative branch of the government of the United States totally unwarranted and unauthorized by the constitution of the United States and the principles of justice, and was and is utterly null and void. That the title of your petitioners and those from whom they derive their right stands unaffected in any manner whatsoever by said repealing act, for the same is an attempt to take private property without compensation, without judicial proceedings, for no crime alleged or proved against the lawful owners thereof, and without due course of law.

And your petitioners further show:

That immediately after the approval of said act of June 2nd, 1858, they, or those under whom they derive their right, did all things within their power to comply with the requirements of the 3rd section of said touching the issuing of a patent for their said lands; that is to say:

On the 13th of November, 1858, they procured to be issued by the United States surveyor general for Louisiana the usual special or patent plat for the claim of Wm. Conway, whereby it appeared that it had been lawfully located and surveyed by the United
54 States, and contained 123,519.90 acres of land.

On the 15th of the same month and year they procured to be issued by the register of the United States land office at New Orleans his patent certificate on said claim, testifying that it had been confirmed by the said act of June 2d, 1858, containing by law-

ful survey said quantity of 123,519.90 acres, and was entitled to patent.

On the 17th November, 1858, John Slidell, then one of the owners of said lands, by letter to the commissioner of the general land office, made formal application for patent on the said instruments, and on the 11th January, 1859, the said commissioner decided, after full and mature examination, that the said patent ought to issue, and so reported to his official superior, the secretary of the interior, before whom the matter was pending when said act of 1860 was approved repealing said grant and revoking the authority to issue a patent thereon; the whole of which will appear by proof upon the trial of this suit.

And your petitioners further show:

That the said Charles Tschirn has in his possession and unjustly detains the same a large number of valuable cypress logs which have been unlawfully cut upon and removed from said lands of petitioners, and without the permission of petitioners or any of them, and against their consent.

That the said logs, commonly called saw-logs, to the number of one thousand, more or less, are now lying in Amite river, bayou Pierre, Petit Amite bayou, and Old river, in the parish of Livingston and state of Louisiana, as follows, to wit:

Three hundred and six (306), more or less, branded at each end with a small letter T, lying in Old river at and near the mouth or upper end of the Petit Amite; all in small rafts or cribs.

Three hundred and fifty (350), more or less, no brands or marks observable, cribbed or in small rafts, lying in Petit Amite bayou, beginning about a mile from its northern end and extending downwards about a mile.

Seventy-four (74), more or less, in the same bayou, beginning at the mouth of bayou Pierre and extending downwards about $\frac{1}{4}$th of a mile; in small rafts or cribs; no marks or brands observable.

Forty-seven (47), more or less, in the same bayou, at and near the entrance into it of Cornet bayou; in small rafts or cribs; no marks or brands observable.

Ninety-three (93), more or less, in Old river, between the Big Bay and Levi Brown's, or the shell mound, branded T in the end of each; in small rafts or cribs.

One hundred and thirty (130), more or less, in Old river, at Big Bay, each marked with an axe, near one end, F 4; in small rafts or cribs.

Now, your petitioners aver that all of the aforesaid cypress saw-logs are the property of and belong to your petitioners, the same having been cut upon and removed from the lands of petitioners, heretofore described, without their permission and against their consent.

That the same are well worth the sum of five thousand five hundred dollars, or more, and that the said defendant unjustly possesses

the same and refuses to deliver the same to your petitioners.
57 And your petitioners have good reason to fear, and do fear and believe that he will send the same out of the jurisdiction of this court pending this suit; and that he will part with and dispose of the same pending this suit.

Now, your petitioners show that the said defendant, Charles Tschirn, in common with the great mass of people living on and near the said lands of your petitioners, controverts and denies the title and right of your petitioners to the same, and asserts and maintains that the true right and title thereto is in the United States or their vendees as to the small portions or parts thereof which are not low and swampy, and thereby rendered unfit for cultivation, and as to all of said lands which are low and swampy, and thereby rendered unfit for cultivation, the said defendant and others allege such portions are the lawful property of the state of Louisiana, or her vendees and alienees, by virtue of donations of all swamp and overflowed lands in said state alleged to have been made to her by the act of Congress approved on the 2nd of March, 1849, entitled "An
58 act to aid the state of Louisiana in draining the swamp lands therein," (9 Stats., 352,) and the act approved 28th September, 1850, entitled "An act to enable the state of Arkansas and other states to reclaim the 'swamp lands' within their limits. (9 Stats., 519.) And said defendant asserts and maintains that whatever right your petitioners, or those under whom they claim, may have had to said lands or any of them by virtue of the grant contained in the 2nd section of said act of Congress of June 2nd, 1858, the same was extinguished and forfeited by the repeal of said second section expressed in the act of Congress approved 22d June, 1860, heretofore referred to by your petitioners.

The foregoing being duly considered, your petitioners pray that the said defendant Charles Tschirn may be duly cited to appear and answer this petition, and that after due legal proceedings your petitioners have judgment declaring them to be the owners of said logs, and entitled to the possession of the same, and requiring the said defendant to surrender up the same or to pay to your petitioners the just value thereof, and that said value be ascertained and
59 fixed by said judgment.

And your petitioners pray, the accompanying affidavits and bond being duly considered, that a writ of sequestration may issue out of this court, under the seal thereof, directed to the marshal, requiring him to seize and take into his possession pending this suit, and according to law, all the afore-described cypress logs, and to make a true return and inventory of the same to this court.

And your petitioners pray for all costs and for general relief; and as in duty bound, &c.

By their attorney:

(Signed) J. L. BRADFORD.

Nicholas H. Rightor, being duly sworn, doth depose and say that he is one of the petitioners in the foregoing petition and has read the

same; that the facts therein stated are true to the best of his knowledge and belief, and that as to the matters of belief and information therein stated he verily believes the same to be true; that several of said petitioners reside outside of the state of Louisiana, and some of them within the said state.

(Signed) N. H. RIGHTOR.

60 Subscribed and sworn to before me this 19th day of May, A. D. 1882.

[SEAL.] (Signed) JAS. D. RANKIN,
Dy. clerk Civil District Court, parish of Orleans.

Jas. L. Bradford, being duly, sworn doth depose and say that he is the attorney at law and the agent for all of the petitioners in the foregoing petition, of whom many reside outside the state of Louisiana and many within the same.

That the defendant is in possession of the cypress saw-logs, as in said petition alleged; all of which have been cut upon and removed from the lands belonging to said petitioners, as alleged.

That he has good reason to fear and believe, and does fear and believe, that he will part with and dispose of and send the same out of the jurisdiction of this court pending the trial of this suit.

(Signed) J. L. BRADFORD.

Sworn to and subscribed before me this 19th day of May, A. D. 1882.

(Signed) T. V. COUPLAND,
Commissioner U. S. Circuit Court, eastern district of Louisiana.

61 *Order.*

Let a writ of sequestration issue as prayed for, and according to law, upon the plaintiffs giving good bond, with good and solvent security, in the sum of two thousand dollars, conditioned as the law directs.

(Signed) EDWARD C. BILLINGS, *Judge.*
New Orleans, May 20th, 1882.

Bond for Sequestration.—Filed May 20th, 1882.

UNITED STATES OF AMERICA.

Know all men by these presents, that we, Nicholas H. Rightor, as principal, and Edward T. Manning, as surety, are held and firmly bound, jointly and severally, unto Francis A. Woolfley, clerk of the Circuit Court of the United States for the 5th circuit and eastern district of Louisiana, in the sum of two thousand dollars, lawful money of the United States of America, to be paid to the said Francis A. Woolfley, heirs, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves

and each of us by himself, and each of our heirs, executors,
62 and administrators firmly by these presents. Sealed with our seals and dated the twentieth day of May, in the year of our Lord eighteen hundred and eighty-two.

Whereas Alfred Slidell and others have this day presented a petition to the honorable the Circuit Court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, praying for the issue of a writ of sequestration against Charles Tschirn:

Now, the condition of the above obligation is that we, the above bounden Nicholas H. Rightor and Edward T. Manning, will well and truly pay to the said Charles Tschirn, the defendant in said sequestration, all such damages as he may recover against us in case it should be decided that said writ of sequestration was wrongfully obtained.

(Signed) N. H. RIGHTOR. [L. S.]
(") ED. T. MANNING. [L. S.]

Signed, sealed, and delivered in the presence of
(Signed) N. T. N. ROBINSON.
(") O. RODRIGUEZ.

UNITED STATES OF AMERICA, } ss.
District of Louisiana, }

Personally appeared Edward T. Manning, who, being duly
63 sworn, deposes and says that he is the surety on the within bond; that he resides in New Orleans, state of Louisiana, and is worth the full sum of two thousand dollars over and above all of his debts and liabilities and property exempt from execution.

(Signed) ED. T. MANNING.

Subscribed and sworn before me this 20th day of May, 1882.

(Signed) T. V. COUPLAND,
Commissioner U. S. Circuit Court,
district of Louisiana.

Writ of Sequestration.—Issued May 20th, 1882.

United States of America.

Circuit Court of the United States, fifth judicial circuit and eastern district of Louisiana.

ALFRED SLIDELL et als. }
vs. } No. 9989.
CHARLES TSCHIRN. }

The President of the United States to the marshal of the United States for the district of Louisiana, greeting:

You are hereby commanded to sequester and take into your

possession according to law the following described property, to wit: Three hundred and six (306) cypress saw-logs, more or less, branded at each end with a small letter T, lying in Old river, at and near the mouth or upper end of the Petit Amite, all in small rafts or cribs; also

Three hundred and fifty (350) saw-logs, more or less, no marks observable, lying and being in the same bayou, beginning about a mile from its northern end and extending downward about a mile; also

Seventy-four (74) saw-logs, more or less, in the same bayou, beginning at the mouth of bayou Pierre, and extending downwards about ¼th of a mile, in small rafts or cribs, no marks or brands observable; also

Forty-seven (47) saw-logs, more or less, in the same bayou, at and near the entrance into it of Cornet bayou, in small rafts or cribs, no marks or brands observable; also

Ninety-three (93) saw-logs, more or less, in Old river, between the Big bay and Levi Brown's, or the shell mound, branded T in the end of each, in small rafts or cribs.

One hundred and thirty (130) saw-logs, more or less, in Old river at Big bay, each marked with an axe near one end F. 4, in small rafts or cribs.

And the same you will safely keep until the further order of the court in the premises; and that you make due return of all your acts and doings herein according to law.

Witness the Honorable Morrison R. Waite, chief justice of the Supreme Court of the United States, this 20th day of May, A. D. 1882.

(Signed) T. V. COUPLAND,
[SEAL.] *Dy. Clerk.*

Marshal's Return.

Received May 20th, 1882, by the U. S. marshal, and on the 29th of said month and year executed the same by seizing and taking into my possession the following-described property, to wit:

90 cypress saw-logs lying at lower mouth of Old river, branded T.

118 cypress saw-logs in Old river at Big bay, mostly marked by an axe E. 4.

63 cypress saw-logs, branded T in the end, all cribbed and afloat in Old river at and near mouth of Petit Amite.

243 cypress saw-logs, branded T in the end, all cribbed and afloat in Petit Amite bayou, commencing about a mile from its upper end and extending down it about a mile.

39 cypress saw-logs, no brands or marks visible, cribbed and afloat in Petit Amite, at mouth of Cornet bayou.

8 cypress saw-logs, cribbed and afloat, no marks or brands visible, in Petit Amite, just below the last lot.

74 cypress saw-logs, no marks or brands visible, cribbed and afloat in Petit Amite, at and just below mouth of bayou Pierre, now

in possession of defendant Charles Tschirn, in Livingston parish, about 75 miles from New Orleans; and the same day served a notice of seizure on the defendant in person at his residence on the Amite river, in said parish.

(Signed) WALTER B. ABLE,
Dy. Marshal.

Citation.—Issued May 20th, 1882.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

UNITED STATES OF AMERICA,
Eastern district of Louisiana.

ALFRED SLIDELL and others
vs.
CHARLES TSCHIRN. No. 9989.

67 The President of the United States of America to Charles Tschirn:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the Circuit Court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, within ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, chief justice of the Supreme Court of the United States of America, at the city of New Orleans, this 20th day of May, A. D. one thousand eight hundred and eighty-two, and of the independence of the United States of America the 106th year.

Teste: (Signed) T. V. COUPLAND,
[SEAL.] *Dy. Clerk.*

68 *Marshal's Return.*

Received May 20th, 1882, by the U. S. marshal, and on the 29th of the same month and year served a copy of this citation and of accompanying petition in person on the defendant at his residence on Amite river, in Livingston parish, La., by handing the same to him. Distance from New Orleans about 66 miles.

(Signed) WALTER R. ABLE,
Marshal.

Rule to bond writ of sequestration.—Entered and filed June 6th, 1882.

U. S. Circuit Court, east. dist. La.

ALFRED SLIDELL et als.
vs.
CHARLES TSCHIRN. } No. 9989.

On motion of Rouse and Grant, attorneys for defendant, and suggesting that defendant desires to release the logs seized herein on giving bond—

It is ordered that the plaintiff show cause on Saturday, 10th June, 1882, at 11 a. m., why said logs should not be appraised and the sequestration set aside, on a proper bond for their value to be fixed by the court.

69 *Marshal's Return.*

Received June 7, 1882, by the U. S. marshal, and on the same day, month, and year I served a true copy of the within rule on J. L. Bradford, esq., by handing the same to him in person in the city of New Orleans.

(Signed) E. S. CURRY,
Dy. U. S. Marshal.

Hearing of Rule to Bond Writ of Sequestration.

Extract from the Minutes, April Term, A. D. 1882.

NEW ORLEANS, SATURDAY, *June* 10, 1882.

Court met pursuant to adjournment. Present: Hon. E. C. Billings, district judge.

ALFRED SLIDELL
vs.
CHARLES TSCHIRN. } No. 9989.

The rule to bond logs, etc., seized in above cause, came on for trial.

J. L. Bradford, for complainants; Rouse and Grant, for mover, defendant in case.

And after hearing argument it was ordered that the matter be referred to R. Loew, U. S. commissioner, to take evidence and report on the value of the logs, staves, &c., seized herein,
70 with power to fix the amounts of bond, in case his report comes in after the adjournment of the court.

Defendant's Exceptions.—Filed June 12th, 1882.

United States Circuit Court, eastern dist. of La.

ALFRED SLIDELL et als.
vs.
CHARLES TSCHIRN. } No. 9989.

Now comes defendant by Rouse and Grant, his attorneys, and excepts to plaintiffs' petition, for this:

1st. That said petition does not show any jurisdiction in this honorable court to try and determine this cause.

2nd. That said petition does not aver upon what particular land the logs claimed in the suit were cut.

3rd. That it does not appear from plaintiffs' petition that they have title to the land from which said logs are alleged to have been taken.

4th. That plaintiffs do not appear to have been in possession of said land, and have no right to recover the produce of the land until their alleged title is established in a suit of ejectment.

71 Wherefore defendant prays that these exceptions be maintained, and that the plaintiffs' petition be dismissed with costs.

(Signed) ROUSE AND GRANT,
Attorneys.

Release Bond.—Filed June 27th, 1882.

Know all men by these presents, that we, Charles Tschirn, as principal, and Charles P. McCann, surety, are held and firmly bound, jointly and severally, unto J. R. G. Pitkin, United States marshal for the eastern district of Louisiana, in the sum of twelve hundred and thirty-one (1231.00) dollars, lawful money of the United States of America, to be paid to the said J. R. G. Pitkin, U. S. marshal, his heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves and each of us, by himself, and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated the 27th day of June, in the year of our Lord eighteen hundred and eighty-two.

Whereas in and by virtue of a writ of sequestration issued
72 out of the honorable the United States Circuit Court for the fifth circuit and eastern district of Louisiana, holding sessions in the city of New Orleans, at the suit of Alfred Slidell et al. *vs.* Charles Tschirn, and numbered 9989 on the docket of said court, and which suit is now pending therein, the following described property, to wit, six hundred and thirty-five (635) cypress saw-logs, as per inventory filed, has been seized, taken into custody of the said U. S. marshal, and detained according to law, but the same has been released and delivered to the said defendant upon the appearance of the said defendant in the said suit and delivery to the said J. R. G. Pitkin, U. S. marshal, the present obligation, which has been executed in pursuance of an order of said Circuit Court issued on the 24th day of June, 1882:

Now, the condition of the above obligation is such, that if the said defendant shall not send the above described property out of the jurisdiction of the court, that he will not make an improper
73 use of it, and that he will faithfully present the same in case he should be decreed to restore the same to the said U. S.

marshal, then this obligation to be void, or else remain in full force.

(Signed) CHARLES TSCHIRN,
By WM. GRANT, [SEAL.]
His Att'y.

(Signed) C. P. McCANN.
Signed in presence of—
W. W. JACKSON.

Transfer.

OFFICE OF THE UNITED STATES MARSHAL,
EASTERN DISTRICT OF LA.,
NEW ORLEANS, *June* ——, 188 .

I do hereby transfer and assign and set over plaintiff herein all my right, title, and interest in and to the within bond.

J. R. G. PITKIN,
U. S. Marshal, eastern district of La.
(Signed) By W. W. JACKSON,
Deputy.

Order—Exceptions assigned for Argument.

Extract from the Minutes, November Term, A. D. 1882.

NEW ORLEANS, *Friday, December 8th*, 1882.

Court met pursuant to adjournment. Present: Hon. E. C. Billings, district judge.

On motion of Rouse and Grant, attorneys for the defend-
74 ant, it is ordered that the exception in the following case be assigned for argument on Saturday, the 16th December, 1882, and that plaintiffs be notified, to wit, No. 9989, Alfred Slidell et als. *vs.* Charles Tschirn.

Motion to quash Sequestration.—Entered and filed December 8th, 1882.

U. S. Circuit Court, eastern dist. of La.

ALFRED SLIDELL et als.
vs.
CHARLES TSCHIRN. } No. 9989.

Now comes the defendant in the above entitled cause and moves the court to set aside the order granted herein for a writ of sequestration and quash the writ of sequestration issued thereon, and to discharge the seizure made by the marshal under said writ for the following reasons:

1st. Because the petition upon which said order was granted was not verified by all the defendants shown by the petition to be residents of the district, and because none of the defendants appear from any of the averments of the petition or affidavit to have been absent

from the state or district when the affidavit for the sequestra-
75 tion was made by J. L. Bradford, esq., counsel.

2nd. Because said counsel was without authority under the law to make the affidavit for sequestration, and his affidavit was not made before an officer authorized to administer oaths in a proceeding before the United States Circuit Court.

3rd. Because the bond given for the sequestration was not made and signed by all of the plaintiffs, and is insufficient in law, and does not satisfy the order of court granting this writ.

It is therefore ordered that the plaintiff show cause on the 16th day of Dec'r, 1882, at 11 a. m., why the order for sequestration should not be set aside and annulled, and the writ of sequestration and the seizure made thereunder quashed.

Marshal's Return.

Received Dec. 9th, 1882, by the U. S. marshal, and on December 11th, 1882, I served a copy of the within rule on J. L. Bradford, esq., attorney for pl'ff, by leaving the same at his office, cor. Camp and Natchez st., city of New Orleans, in the hands of W. H.
76 Wright, his clerk.

(Signed) E. S. CURRY,
D'y U. S. Marshal.

Order—Exceptions and Rule to quash Sequestration continued.

Extract from the Minutes of Saturday, December 16th, 1882.

ALFRED SLIDELL et als. } No. 9989.
vs.
CHARLES TSCHIRN. }

By agreement by the counsel for the respective parties, the exceptions and motion to quash writ of sequestration and seizure thereunder are continued till Saturday, January 6th, 1883, at 11 a. m.

Order—Exceptions and Motion to quash Sequestration continued.

Extract from the Minutes of Saturday, January 6th, 1883.

ALFRED SLIDELL et als. } No. 9989.
vs.
CHARLES TSCHIRN. }

Ordered that the motions to quash the writ of sequestration and seizure thereunder, and exceptions, go over to Saturday, 13th instant, at 11 a. m.

77 *Hearing and Submission of Exceptions and Rule to Quash Sequestration.*

Extract from the Minutes of Saturday, January 13th, 1883.

ALFRED SLIDELL et als.
vs.
CHARLES TSCHIRN. } No. 9989.

The exception of no cause of action, and the motion to quash the writ of sequestration filed in the above-entitled and numbered cause by the defendant therein, came on to be heard and was argued by the counsel for the parties respectively and submitted. When the court took time to consider.

Order—Writ of Sequestration quashed, Exceptions sustained, and Petition dismissed.

Extract from the Minutes of Saturday, February 24th, 1883.

ALFRED SLIDELL et als.
vs.
CHARLES TSCHIRN. } No. 9989.

This cause came on to be heard at this term upon the defendant's motion to quash and set aside the writ of sequestration, and
78 the exceptions to plaintiffs' petition, and was argued by counsel.

And the law being in favor of defendant, both as to the said motion and the exceptions, it is ordered that the writ of sequestration issued herein be and the same is hereby quashed and set aside; and it is further ordered and decreed that the exceptions filed by the defendant be sustained, and that the plaintiffs' petition be and the same is hereby dismissed at plaintiffs' costs.

Motion and Order for Writ of Error.—Entered and filed June 4th, 1883.

U. S. Circuit Court.

ALFRED SLIDELL et als.
vs.
CHARLES TSCHIRN. } No. 9989.

On motion of J. L. Bradford, attorney for the plaintiffs in the above-entitled cause, and on suggesting to the court that the said plaintiffs are aggrieved by the final judgment rendered against them in said cause, and believing that there is error therein:
79 It is ordered that the said plaintiffs be and they are hereby allowed a writ of error to the Supreme Court of the United States, returnable therein on the second Monday of October next, ensuing, upon the said plaintiffs giving bond, with one solvent surety, in the sum of three hundred dollars, conditioned as the law directs.

Bond for Writ of Error.—Filed June 6th, 1883.

Know all men by these presents, that we, Nicholas H. Rightor, as principal, and Edward T. Manning, as surety, are held and firmly bound unto —— ——— in the full and just sum of three hundred dollars, to be paid to the said —— ———, certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fifth day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately, at a Circuit Court of the United States,
80 fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit pending in said Circuit Court, wherein Alfred Slidell and others are plaintiffs and Charles Tschirn is defendant, judgment was rendered against said Alfred Slidell and others, plaintiffs; and the said Alfred Slidell and others, plaintiffs, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Circuit Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said —— ———, citing and admonishing ——— to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next—

Now, the condition of the above obligation is such, that if the said Alfred Slidell and others, plaintiffs, shall prosecute their writ to effect, and answer all damages and cost if they fail to make their plea good, then the obligation to be void; else to remain in full force and virtue.

(Signed) N. H. RIGHTOR. [L. S.]
(Signed) E. T. MANNING. [L. S.]

Sealed and delivered in the presence of—
(Signed) J. L. BRADFORD.
81 (Signed) W. H. WRIGHT.

Bond approved June 7th, 1883.
(Signed) EDWARD C. BILLINGS,
Judge.

Agreement of Counsel as to making up of Transcript.—Filed June 21st, 1883.

Circuit Court of the United States in and for the fifth circuit and eastern district of Louisiana.

ALFRED SLIDELL et als.
vs.
CHARLES TSCHIRN. } No. 9989.

In the above entitled cause it is agreed by counsel that in making up the transcript of the record of appeal the clerk may omit therefrom the following documents:

1st. The inventory of the marshal filed June 27th, 1882, showing the number, dimensions, and brands of the cypress logs seized by him under the writ of sequestration issued in said cause.

2nd. The report of K. Loew, U. S. commissioner, under
82 the order of reference of June 10th, 1882, in said cause, (and other similar causes,) requiring him to take evidence upon the value of the logs seized, and on certain conditions to fix the amount of the release bond.

3nd. The evidence taken by said Commissioner Loew as to the value of said logs.

It being agreed that the property sequestered was released to the defendant on an appraisement thereof made by K. Loew, U. S. com'r, under an order of court, defendant giving the release bond, a copy of which is in the record.

(Signed) J. L. BRADFORD,
Attorney for Pl'ffs.
ROUSE AND GRANT,
for Deft.

83 UNITED STATES OF AMERICA.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE:

I, Francis A. Woolfley, clerk of the Circuit Court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 82 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Alfred Slidell et als. *vs.* Charles Tschirn, No. 9989 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 30th day of June, A. D. 1883.

[Two (2) words interlined, six (6) words erased, approved.]

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States district judge for the eastern district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 30th day of June, A. D. 1883.

[Three (3) words interlined, approved.]

EDWARD C. BILLINGS, *Judge.*

84 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judges of the Circuit Court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Alfred Slidell, Oliver Beirne, Nicholas H. Rightor, Robert Lawes, Marguerite Mathilde Slidell, wife of Baron D'Erlanger; Marie Rosine Slidell, wife of Count de St. Roman; Marie Marguerite Caroline Slidell, wife of Jacob Antoine de Heydegg; Henry C. Millaudon, Benjamin L. Millaudon, Jeanne Henrietta Millaudon, widow of C. C. Gardanne, dec'd; Laurent Andre Burthe, Josephine Pages, widow of Emanuel Burthe, dec'd; Thomas Butler, tutor, &c., Genevive Millaudon, wife of George E. Brown; Louise Burthe, widow of D. F. E. Burthe; Nicholas B. Trist, Louisa Bringier, wife of Martin Gordon, jr.; Aglae Bringer, wife of Benjamin Tureaud; Marius S. Bringier, Octavie Bringer, wife of Allen Thomas; Martin Duradon Bringier, Louise Taylor, Bettie Taylor, wife of Walter Stauffer; Nicholas P. Trist, Wilhelmine Trist, wife of Robert C. Wood, and Duncan F. Kenner, plaintiffs, and Charles Tschirn, defendant, a manifest error hath happened to the great damage of the said Alfred Slidell and others, plaintiffs aforesaid, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] F. A. WOOLFLEY,
Clerk of the U. S. Circuit Court for the eastern district of La.

[Endorsed:] United States Circuit Court, eastern district of Louisiana; No. 9989; Alfred Slidell and others *versus* Charles Tschirn; writ of error; service of citation, writ of error, and motion accepted for defendants in error June 4, 1883; J. D. Rouse, Wm. Grant, att'ys; filed June 4, 1883; F. A. Woolfley, clerk.

[Endorsement on cover:] E. Louisiana, C. C. U. S.; No. 917; Alfred Slidell, Oliver Beirne, Nicholas H. Rightor et als., plaintiffs in error, *vs.* Charles Tschirn; filed 6th August, 1883; 85 pages.

111-412

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

ALFRED SLIDELL ET ALS., *Appellants*,
vs.
GEORGE H. GRANDJEAN, *a U. S. Deputy Surveyor, Appellee.* } No. 587.

SAME, *Appellants*,
vs.
JAMES G. RICHARDSON, *Register of the Louisiana State Land Office, Appellee.* } No. 588.

SAME, *Appellants*,
vs.
THOMAS J. EMLER, ET ALS., *Appellees.* } No. 916.

SAME, *Plaintiffs in Error*,
vs.
CHARLES TSCHIRN, *Defendant in Error.* } No. 917.

JAMES L. BRADFORD,
Solicitor and Attorney for all the Plaintiffs.

WASHINGTON, D. C.:
PRINTED BY W. H. MOORE, 511 ELEVENTH STREET, N. W.
1883.

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No. 916.

SAME, *Plaintiffs in Error*,
vs.
CHARLES TSCHIRN, *Defendant in Error.*
No. 917.

NOTE.—In the following brief the references are to the printed record in Slidell et als. vs. James G. Richardson, No. 588, unless otherwise stated; also to the edition of the American State Papers, by *Duff Green.*

Statement of Case.

The above suits, the first three in equity, the last at law, all advanced on the docket and consolidated, were brought in the Circuit Court of the United States for the Eastern

District of Louisiana by the owners of the William Conway division of the Houmas grant in Louisiana to protect the same from hostile surveys and alienations by the United States and State of Louisiana, and from destructive trespass by squatters, &c., and were all tried by the district judge. The history of the grant is briefly this:

On the 5th October, 1774, the Houmas and Bayou Goula tribes of Indians sold to Maurice Conway and Alexander Latil their land, fronting the Mississippi, about twenty-two leagues above New Orleans and on the same side, described as upwards of half a league in front and as extending from the lands of "John, the blacksmith, above, to the lands of an old accadian, named Peter, below." The sale was silent as to depth, (see English translation, Senate Document 144, 25th Cong., 2d sess., pp. 13, 14, being "memorial of the representatives of Wade Hampton,") and was approved on the same day by Don Louis Unzaga, at New Orleans, the political and military governor under Spain of the province of Louisiana, who, on the 1st November following, issued to the purchasers a complete patent. This fixed the depth at 40 arpens, and is called the patent of 1774. (See approval of sale and patent, pp. 14, 15, Hampton's memorial above referred to.) Maurice Conway, desiring to open plantations on the land, petitioned the authorities on 9th September, 1776, stating he had acquired Latil's interest in the grant of 1774; that the land was cleared to the depth of about a league, (84 *arpens;*) that the cypress forests were about a league and a half from the river, (126 *arpens,*) and praying, for these reasons and because he required timber for his plantations, that he be granted *all* the vacant land in the rear of the first forty arpens in depth, which he then owned. (Printed record, 41.) On the 27th September, 1776, Unzaga issued, in response to this petition, an order or warrant of survey, requiring Louis Andry, his adjutant, to survey the additional depth, give the applicant possession, and make a *proces verbal*, or return of his proceedings. This was done by measuring for the first time

the actual front of the Indian sale and patent of 1774, by which it was ascertained to be 96 *arpens*. Andry then ran the upper side line out 40 arpens distant from the river, and there established a corner, which was the upper back corner of the grant of 1774.

He then extended this line out two *arpens* further, and there put up a post, in order, as he said, "to keep the course." He did the same with respect to the lower side line, fixing one corner at 40 arpens from the river, as the lower back corner of the front grant, and another at two arpens further back, "in order to keep the course." (Record, 41, 42.) He then put the petitioner in possession, and made his usual return. Thereupon Galvez, the successor of Unzaga, on the 21st of June, 1777, issued a patent to Conway, reciting the survey made by Andry, the possession he had given him of "all the vacant land lying behind and on the rear of the first forty arpens," and concluding thus, "Approving of the same, as we do by these presents approve, using of the power to us conferred by the King, we hereby do grant in his royal name, to the said Maurice Conway the said land behind or in the rear of the forty arpens which contain his plantation, situated in the district of La Fourche, by ninety-six in front on the river, following the same direction which those run, in order that, it being his property, he may share and dispose of the same, ruling himself upon the aforesaid proceedings, and observing the conditions prescribed in the ordinance relative to this subject." (Record, 43.) The upper side line ran out at about right angles to the river, as did the lower one, but by reason of the great bend at that place, they diverged greatly, thus giving to the Houmas grants, (formed of the patents of 1774 and 1777,) a fan shape: (see these proceedings in Spanish in Senate Document 45, 28th Cong., 2d sess., pp. 8, 9, 10, and in English, Clark's Land Laws, appendix, pp. 955, 956; also in Hampton's Memorial, pp. 18, 19, 20; and in 2 White's Recopilacion, pp. 411, 414.) Spain was at these times sovereign in possession

of the province of Louisiana west of the Mississippi, and of the Island of New Orleans east of it. Her northern limit on the east of the river was a line formed by the lakes Borgne, Pontchartrain, Maurepas, (with their connections,) and the Iberville river, now Amite river and Pass Mauchac. Spain ceded the province to France in 1800, and in 1803, (8 Stats., 200,) the latter ceded it to the United States with a stipulation protecting the inhabitants in the rights of property. Under the act of Congress of 31st October, 1803, (2 Stats., 245,) the President appointed Wm. C. C. Claiborne governor of the territory, and in 1803 or 1804 he granted leave, with military protection if necessary, (Senate Document 45, &c., p. 20; Hampton's Memorial, etc., pp. 29, 30,) to the then owners of the land, to have it fully surveyed, and all its boundaries established. In 1803, 1804, and 1805, one Lafon executed these surveys and certified plats, and made *proces verbals* of his operations, dividing the tract into three subdivisions, each with its proportional front on the river, and each bounded by side lines extending to the full depth, that is, to the Ibervile river and lake Maurepas. The upper subdivision has since taken the name of the Donaldson & Scott claim, the lower subdivision that of the William Conway claim, and the middle one, that of the Daniel Clark claim, by which designations they are yet known and treated. These plats of Lafon appear in Senate Document 45, &c., opposite pages 6, 12, and 16, and his plat of the William Conway claim, (now before the court,) appears in the record of suit No. 588, p. 92; the translation of his survey appears on pp. 114, 115. These are important as the claims have been surveyed by the United States and conformed upon these plats and surveys.

Under the act of March 2d, 1805, (2 Stats., 324,) a board of land commissioners was organized at New Orleans to receive notices and evidence of claims to land, to decide the same according to equity and justice, and to report their decisions to Congress for its final action.

Before this board Donaldson & Scott filed their claim and evidence in support of it for the upper subdivision of the Houmas Grant; Daniel Clark for the middle subdivision and William Conway for the lower one, each relying upon the grant heretofore referred to, deducing title from Maurice Conway, and each defining the tract claimed by the aforesaid plats and surveys of Lafon. These notices of claim, the conveyances, plats, and surveys, and the decisions of the commissioners confirming them, appear *in extenso* in Senate Document 45, &c., on p 45 of which is also a connected plat of all, compiled by the general land office and exhibiting the entire Houmas tract, with its diverging side lines, extending from the Mississippi in front to the Amite river and lake Maurepas in the rear. In the William Conway claim his notice of claim is to be found in record of suit 588, on pp. 113, 114; his evidence on pp. 92 to 98; and the decision of the board in his favor on p. 98, and also on p. 40. The decisions of the commissioners on all the claims likewise appear now in the American State Papers, Public Lands, vol. 2, p. 287, Duff Green's ed., under the numbers 125, 127, and 133, and were rendered on the Wm. Conway and Clark claims March 3d, 1806, and on the Donaldson & Scott claim March 10th, 1806. (Record, 127.)

Under section 5 of the act of 1805 the commissioners in due time sent to the Secretary of the Treasury, to be laid before Congress, a transcript of their favorable decisions, and another such transcript to the officer then exercising in the territory the duties of surveyor general therein, and on the 9th of January, 1812, the secretary transmitted this transcript to Congress. See State Papers, vol. 2, p. 224, Green's ed. They were final until disaffirmed by Congress. By section 2 of the act of June 2d, 1858, (11th Stats., 294,) they were affirmed, but by the subsequent act of 21st June, 1860, (12 Stats., 866,) this confirmation was repealed, and it is as a consequence of some feeble efforts of the land department, twenty years later, to enforce this revocation that these suits have arisen.

In 1829, James P. Turner, surveyor general of Mississippi, and as such *ex officio* surveyor general of Louisiana, wrote the Commissioner of the General Land Office about the manner of extending the surveys of the public lands adjacent to the Houmas tract, and then for the first time a Government officer questions the extent of it to the rear. (Senate Document 45, &c., pp. 24, 25.) He was accordingly instructed to limit it by a rear line parallel with the Mississippi, and a league and a half distant therefrom, and to survey the residue as public land of the United States, the commissioner believing that the courts alone could fix the boundaries, and that in no event would they sanction a greater depth. (Record, 86; Senate Document 45, &c., pp. 26, 27; Laws, Opinions and Instructions, part 2, No. 879.)

The only reason why this exact distance was adopted is supposed to be found in an assumed intent, in the patent of 1777, to extend the grant only to the cypress forests, which Conway had declared were that far from the river. However this may be, the Donaldson and Scott, and the Daniel Clark claims, back of such line, were surveyed as public lands, and some portions of the William Conway claim, in the years 1829 and 1830; and under the preemption laws of May 29th, 1830, June 15th, 1832, and June 19th, 1834, nearly the whole of these lands were sold by the United States to actual settlers, who, with their families, took possession against every protest and opposition the grant claimants could address to them and the land department; see list of these sales, Senate Document 45, &c., pp. 148 to 156. Finally, the error of the Government became apparent, and accordingly the Commissioner of the General Land Office, on 17th June, 1836, instructed the register and receiver at New Orleans, that as the claims were then pending before Congress for adjustment, the lands within their *alleged and claimed* limits were protected by section 6 of the act of March 3d, 1811, (2 Stats., 662,) from sale, and, hence, the sales already made were void.

Thereupon they were all cancelled, and further sales in the claimed limits forbidden, (Senate Document 45, &c., p. 28; record, p. 88.) Then commenced a controversy between the grant claimants and the officers of the land department, which, with varying success, lasted until about the year 1848, in the progress of which decisions, opinions, surveys, patent plats, patent certificates, and the like, multiplied with such rapidity, and in such volume, that the mind wearies in the effort to grasp them. The most important among them are stated in chronological order on pp. 10 to 15 of the record in the suit against Richardson, register of the State land office, and also in the bills of complaint in the other cases. Out of this medley arise the following, having an important bearing on the questions before the court:

1st. On August 12, 1844, the Secretary of the Treasury, in a long opinion (record 99–104), held the three Houmas claims confirmed by the act of 18th April, 1814 (3d Stats., 137), and entitled each to a patent for the whole amount claimed before the commissioners in 1806. On the 22d August, 1844, patents accordingly issued for the Donaldson and Scott, and Daniel Clark subdivisions. (Record, 84, 85).

2d. On the 10th December, 1844, the Senate passed a resolution calling on the secretary for a report of all he had done in the premises, with copies of all surveys, plats, decisions, &c., relating to the Houmas claims, who, on the 8th January, 1845, sent that body a mass of documents now extant in what we have termed Senate Document 45, &c. It contains most of the documents of importance, up to that time, affecting the claims.

3d. On June 26th, 1846, the Senate and House, by joint resolution (9th Stats., 110), directed the Attorney General to examine the evidences of title founding the Houmas claims, and to report to the President his conclusions, re-

questing the President, if they were against the legality of the patents issued, or to be issued, to bring suits to have the same judicially determined. In a long opinion, the Attorney General held the patents void, and the grant of 1777 valid as a perfect title to the depth of two arpens, which added to the 40 arpens granted in 1774, made 42 arpens in depth for the two, and advising that the residue be treated as public domain. This opinion, made the basis of action by the Government to this date, is predicated on the fact that Spain only surveyed the side lines of the second grant to the depth of two arpens, (4th Opinions Atty. Genl., 643.) Under this opinion the President, in 1849, had chancery suits brought in the United States circuit court for Louisiana, to annul the patents, and by decree in 1856 that issued to Daniel Clark was declared void, and by a recent decree that issued to Donaldson and Scott has shared the same fate. These decrees are silent as to the validity of the Houmas grants, the only issue being the validity of the patents under the act of 18th April, 1814 (3d Stats., 137), under which they were issued (record 68).

This brings us to the act of June 2nd, 1858, the most important law affecting the grants. (11 Stats., 294.) By its 2nd section it was provided: "*That the decisions in favor of land claimants made by P. Grimes, Joshua Lewis, and Thomas B. Robertson, commissioners appointed to adjust private land claims in the eastern district of the Territory of Orleans, communicated to the House of Representatives by the Secretary of the Treasury on the ninth day of January, one thousand eight hundred and twelve, and which is (are) found in the American State Papers, Public Lands, (Duff Green's edition,) volume two. from page two hundred and twenty-four to three hundred and sixty-seven, inclusive, be, and the same are herby, confirmed, saving and reserving, however, to all adverse claimants the right to assert the validity of their claims in a court or courts of justice: Provided, however, That any claim so recommended for confirmation, but which may have been rejected, in whole or in part, by any subsequent board of commissioners, be, and the same is hereby, specially excepted from confirmation.*"

Under the hostile action of the land department the entire grant, (save the immediate front lands on the Mississippi, now forming six large and valuable sugar plantations cultivated to an average depth of 80 to 100 arpens,) was colonized by great numbers of people, who now number probably five thousand souls in all. They at once, under the instigation of political foes to the grant claimants, raised large sums of money and sent influential persons to Washington to secure a repeal of the act of 1858. Mr. Robert Toombs, of Georgia, then in the Senate, espoused their cause, and on March 23d, 1860, as chairman of a select committee, in a remarkable report, in which no imputation is cast upon the claimants or Congress, and in which the confirmation by the act of 1858 is recognized, deliberately recommended its repeal. (See Toombs' Report, being Senate Report of Committee No. 150, 36th Cong., 1st sess.)

The act had by joint resolution of March 3d, 1859, (11 Stats., 442,) already so far been suspended that it was forbidden to any officer to issue patents on the confirmations, and on June 21st, 1860, (12 Stats., 866,) the repeal came. It was as follows:

"*That the second section of an act passed the second day of June, one thousand eight hundred and fifty-eight, entitled 'An act to provide for the location of certain confirmed private land claims in the State of Missouri, and for other purposes,' and all other parts of said act which relate to lands in Louisiana confirmed by said second section (so far as said lands are concerned,) be, and the same are hereby repealed.*

"SEC. 2. *And be it further enacted, That Congress hereby refuse to confirm to the claimants under the Houmas grant the lands embraced in certificates number one hundred and twenty-five to William Conway, number one hundred and twenty-seven to Daniel Clark, and number one hundred and thirty-three to Donaldson and Scott.*"

This is the only instance known to counsel in which Congress has intentionally repealed a confirmation of a Spanish, French, or Mexican grant, and must find its explanation in the heated state of local political animosities'

whose baleful influences under the leadership of Georgia's restless Senator found lodgment in the Congress of the Union. In order to secure the patent provided by the act of 1858, the owners of the William Conway claim obtained, on November 13, 1858, from the surveyor general of Louisiana his special or patent plat of the claim, (record, p. 36,) and on the 15th November also obtained from the register of the land office at New Orleans his patent certificate, (record, p. 36,) testifying they were, under said act, entitled to patent for the claim, and assigning it an area of 123,516.09 acres. As required by the act these instruments were filed with the Commissioner of the General Land Office, who, on January 11, 1859, submitted to the Secretary of the Interior (record, 66,) a report reviewing the claim and holding the confirmees entitled to patent. While the Secretary held the matter under consideration the joint resolution of March 3, 1859, passed, which, of course, stopped all proceedings. After the repeal the Secretary simply returned the papers to the Commissioner, calling his attention to that fact, but not dissenting from his findings. (Record, 69.)

Nothing was done to enforce the repeal until 1878. In that year an application was made to the Commissioner of the General Land Office by the owners of the William Conway claim to again take up the proceedings, and issue the patent notwithstanding the repeal of the confirmation, but he declined in an opinion, (record, 133, 134,) in which he held the claim confirmed by the act of 1858 for its whole amount, that the repeal was obligatory upon him as an executive officer, and not to be questioned or disobeyed, admitting it to be unconstitutional, and further holding the grant of 1777 valid as a perfect title, requiring no confirmation, but only to the depth of 40 arpens. Mr Carl Schurz, then Secretary, reversed the Commissioner, and held, on the authority of the Attorney General's opinion of 1847, (4th Opinions, 643,) the grant of 1777 valid under the treaty of 1803 as a complete grant only to the

depth of *two arpens*, (with that of 1774 making 42 arpens from the river,) and directing that the residue be surveyed and disposed of as other public land. (Record, 60, 61.) He held the repeal unconstitutional, but said (record, 60): "Without discussing the question of the power of Congress to repeal a confirmatory statute, by which a disposal is alleged to have been made of what is claimed to be a portion of the public domain, I am of opinion that a *positive and specific* enactment of Congress should control and govern this department while the same remains in force and is not pronounced by the courts to be unconstitutional." Accordingly, after a delay of 90 days to enable the claimants to get their grievances before the courts, (record, 65,) the same Secretary ordered the Commissioner of the General Land Office, on June 1st, 1879, (record, 66,) to carry his decision into effect as to the Wm. Conway claim, holding that the supposed outstanding patents of 1844 protected the other two subdivisions from a like fate. Under these orders the surveyor general of Louisiana proceeded to let numerous contracts for the survey of all the land in the Wm. Conway claim back of 42 arpens from the river as public land. These are enumerated on p. 19 of the record.

As stated before, a part of the Conway division had been so surveyed about 1830, and under the Secretary's ruling, such portion being back of the 42-arpen line, was at once selected as enuring to the State of Louisiana as swamp land under the grant made by the act of March 2d, 1849, (9 Stats., 352.) These selections were approved by the Secretary 10th June, 1881, reversing the Commissioner of the General Land Office, under authority of Ham vs. Missouri, (18 How., 126,) though the Commissioner had held that being within the claimed limits of a private land claim *subjudice* at the date of the swamp grant they were excepted from its terms under the principles announced in Newhall vs. Sanger. (2 Otto, 761.) Thus over eleven thousand acres of the Conway claim vested in the State, so far as executive action could vest them. (Record, 58,

59.) Under this act of 1849 the State now claims nearly the whole of the rear land in the Conway claim, holding that the exception in the act of "lands held or claimed by individuals" must be confined to such as are *lawfully* so held or claimed. She further fortifies her claim by holding that as no suit for confirmation was brought against the United States under the act of 17th June, 1844, (5 Stats., 676,) applying to Louisiana the Missouri act of 26th May, 1824, (4 Stats., 52,) the claim was *ipso facto* reannexed to the domain on the 18th June, 1846, and as such became subject to the grant of 1849.

So fast as the surveys progressed in the Conway division the surveyor general selected and made the usual lists of lands shown to be swamp and unfit for cultivation, and at once furnished the State land officers duplicate originals thereof, on which they at once proceeded to sell the same under State laws held to sanction such wrongs, and to grant homestead, pre-emption, and other rights thereon, (record, 30, 38,) and under these pretenses the work of spoliation has gone on with renewed vigor until large areas are totally stripped of all that ever made them valuable. It was to check these ruinous wrongs and to appeal to the courts while anything of value remained on the land, and to secure against confiscation the improvements on the cultivated front lands, that the suits now before the courts were instituted.

It may be further stated that the bill against the United States surveyor alleged that these surveys were intended as preliminary to and to furnish the usual means for the sale and other disposition of said lands by the officers of the land department under the general laws of Congress.

The foregoing is a substantial statement of the facts of these cases.

The proceedings in the court below were briefly these:

Alfred Slidell et als. *vs.* George H. Grandjean, No. 587

here, was a bill to restrain him from extending the lines of the public surveys over a portion of the Conway claim under pretended authority of a surveying contract entered into with the surveyor general of Louisiana, acting under the instructions of the Secretary of the Interior and Commissioner of the General Land Office, as shown on pp. 132, 133, of the record in the case No. 588, against Richardson, register of the State land office.

A restraining order and injunction *pendente lite* issued, the bill, on demurrer, was dismissed, the injunction dissolved, and thereupon complainants appealed.

Alfred Slidell et als. *vs.* Leon Fremaux, register, &c., (James G. Richardson, his successor, substituted,) No. 588 here, was a bill to restrain him and his successors from hostile sales and other alienations under State law of any lands in the Conway claim, under her claim of right thereto growing out of the swamp land grants or other legislation of Congress. The defence, by answer, maintained substantially:

1st. That the lands were vested in the State, and not in respondent, who was simply charged with the duty of selling her lands and keeping accounts of such sales.

2d. That the State being a necessary party had not been impleaded, and could not be without her consent, and hence there was no jurisdiction.

3d. That the bill exhibited a disputed title not settled at law, was in effect an ejectment in disguise, and hence not within equitable cognizance.

4th. That the lands in question were swamp lands donated to the State by the acts of 1849 and 1850, had since been surveyed by the United States, had been listed, and some of them patented to the State, and that hence since 1849 the State had been and was sole owner of the same.

5th. That the grant to Maurice Conway was a perfect grant to the depth of 42 arpens, and as such protected by treaty; that Wm. Conway believed it was incomplete for the residue because he went before the commissioners in 1806 to secure its confirmation; that their decision was not acted upon by Congress until 1858, wherefore the prior swamp grant of 1849 vested title in the State without any reservation; that even if the alleged confirmation by the act of 1858 was not lawfully repealed by the act of 1860, a prior title had vested in the State, as aforesaid, by the swamp grant. That all surveys and plats of the Conway claim prior to 1858 were void, as without lawful authority, and no survey had been made since, and complainants could have no *standum* in *judicio* without it and without such a certificate of location as the act of 1858 required.

6th. That if the claim was confirmed by the act of 1858, as the distances on the side lines of 351 and 455 *arpens*, respectively, called for in the Commissioner's decision of 1806, will not reach the Amite and lake Maurepas, respectively, therefore its true rear line should not be those bodies of water, but a straight line to be run according to this theory, &c.

7th. That the 2d proviso to sec. 6 of the act of March 3d, 1811, (2 Stats., 662,) did not restrict the power of *Congress* to dispose of the lands pending the claim, but only that of the land officers to offer the same for sale.

8th. That respondent had only acted with reference to the lands as a State officer and pursuant to law, and as such had made sales and had lawful right so to do so soon as the same were selected and before issue of patent to the State, which would issue as of course, since the executive authority of the United States had already decided the same belonged to the State.

9th. That the State not being a party equity cannot try

title to land claimed by her, and thus prevent a cloud and save multiplicity of suits, &c., and that a decree in favor of complainants would be fruitless, because the State could at any time convey the lands by legislative grant unaffected by a judgment against her officers.

By supplemental answer it was held in substance:

1st. That the grant to Maurice Conway was only valid under the treaty for 42 *arpens* in depth, and was as to the residue only inchoate, and so virtually admitted by Wm. Conway in his efforts to secure Federal confirmation before the commissioners in 1806.

2d. That no suit for confirmation of title ever having been brought under the act of 26th May, 1824, (4 Stats., 52,) as revived and applied to Louisiana by the act of 17th June, 1844, (5 Stats., 676,) the claim, back of 42 *arpens*, was *ipso facto* forfeited on the 17th June, 1846, and thereafter became subject to the swamp land grants to the State by the acts of 1849 and 1850.

To these defences a general replication was filed and a mass of documentary proof submitted without objection, among which were various admissions of counsel on both sides, found on pp. 38, 40, 149, and 151 of the record in that case. The chief admissions by complainants were:

1st. That the true length of the lower side line of the Wm. Conway claim, as developed by Federal surveys, is about 125 arpens greater than 455 arpens, and that of the upper side line, about 45 arpens greater than 351 arpens, which distance of 455 and 351 arpens, respectively, were assigned as the lengths of such lines by the plats and certificates of Lafon, as laid before the board of commissioners, pursuant to which they rendered their decision in 1806, (record, 39.)

2d. That the great mass of the lands in the Wm. Con-

way claim, back of 42 arpens, is swamp and overflowed lands, as described by the swamp land grants of 1849 and 1850, (record, 39.)

The chief admissions of respondent were:

1st. That no land in the claim had ever been surveyed by the United States under the "radiating lot system," under section 2, act of March 3, 1811, (2 Stats., 662,) or section 1, act of 24th May, 1824, (4 Stats., 34,) (record 38.)

2d. That he had made a great many sales, and granted many pre-emption and homestead rights on said lands under the State's claim of title under the swamp land grants, and, but for the restraining order and injunction *pendente lite*, would have so continued to do, (record, 38.)

3d. That this had been done only as to lands described in lists of swamp land selections made and certified by the United States surveyor general for Louisiana, and without regard to the fact that the Secretary of the Interior had or had not approved said lists, (record, 38.)

4th. That in the case of said lists of selections, for about 50,000 acres, a large quantity, before said lists or the maps of survey were certified by the surveyor general and sent to the State land office, was allowed to be absorbed by actual settlers, to whom defendant had issued certificates testifying that the holders had applied to purchase the same as pre-emptions under State law, &c., (record, 38, 39.)

5th. That whatever right Wm. Conway had in said lands had devolved to complainants under derivative titles, (record, 39.)

6th. That before the filing of the bill nearly all the land in the claim had been surveyed by deputy surveyors under the surveyor general of Louisiana, and that said surveys had been approved by said surveyor general, (record, 39.)

7th. That the original of the special or patent plat of the Wm. Conway claim, certified by the surveyor general of Louisiana, 25th November, 1844, if it ever existed, has been so mutilated that no copy can be made. (Record, 39.)

8th. That the records of the United States land office at New Orleans have been consumed by fire, nearly, and the remains are a mass of charred rubbish, &c. (Record, 40.)

There was a motion by complainants to suppress a map of the Conway claim, (record, 33,) but on the voluntary withdrawal the motion was discharged. (Record, 154.) Likewise there was a motion (record, 149) to suppress the plat and certificate of Lafon, filed in evidence by complainant, which motion with the cause was submitted to the court (record, 155) for trial, but no reference to it appeared in the final decree, (record, 155,) and hence it was in effect overruled.

With these exceptions no evidence on either side was objected to. There were no findings of fact by the court, no exceptions, no rulings asked, made, or refused.

The proof made by complainants, and appearing at large in the record, showed:

The petition of Maurice Conway, of September 9, 1776, asking a grant of the lands in his rear, (record, 41, 94;) the order of survey granted in his favor for the land applied for of 27th September, 1776, (record, 41–94;) the return of the surveyor under said order of 1st October, 1776, (record, 41, 42 and 94, 95;) the grant or patent issued by Galvez, 21st June, 1777, in favor of Maurice Conway, for the lands applied for, (record, 43, 96;) the license of Governor Claiborne, authorizing Lafon to survey the three Houmas claims, and giving him military protection, (record, 13;) the plat and survey of the William Conway claim, by Lafon, in pursuance of the foregoing authority, (record, 92, 114;) the notice of Wm. Conway, filing his claim and

evidence before the board of commissioners, dated 28th February, 1806, (record, 113,) with his deeds so filed, proving his right under Maurice Conway to the lands so claimed, (record, 124, 147;) the decision of the board of commissioners of 3d March, 1806, confirming the claim of Wm. Conway to its full extent, (record, 40, 98, 150;) the decision of the Secretary of the Treasury of 12th August, 1844, recognizing the confirmation of the Conway claim, (record, 99, 104;) the orders of the Commissioner of the General Land Office, of 24th October, 1844, to the surveyor general of Louisiana and the register at New Orleans, telling them to prepare and issue, respectively, the patent plat and patent certificate in favor of the Conway claim that patent might issue thereon, (record, 49;) that these officers issued said instruments on said claim, thereby entitling it to patent, (record, 36, 131.)

That on June 2d, 1858, Congress did confirm the decision of the commissioners of 1806, thereby vesting full title in Wm. Conway and his legal representatives to the lands involved, (record, 16, 36;) that on 1st May, 1879, the surveyor general of Louisiana certified in behalf of Louisiana, as enuring to her under the swamp land grant of 1849, a list of selections of lands in the Conway claim for 10,745.11 acres, (record, 124;) that likewise, on 18th August, 1879, he certified another of such lists in favor of said State for 1,502.31 acres of said lands, (record, 123;) that on the 22d June, 1877, the Commissioner of the General Land Office decided the claim confirmed for its full amount by the act of 1858, but that said confirmation having been repealed by the act of 1860, which he could not question, the claim stood only on its merits as a perfect title, and therefore only valid, in his opinion, to the depth of 40 arpens (making, with the grant of 1774, 80 arpens from the river), (record, 133, 144;) that the Secretary of the Interior decided on 4th May, 1878, the same things about said claim, but that as a perfect title it was only valid for 2 arpens in depth (making, with the grant of 1774, 42 arpens

from the river), record, 60–62; that the Commissioner of the General Land Office on 8th July, 1879, ordered the Surveyor General of Louisiana to survey accordingly, as public, the lands in the Conway claim back of 42 arpens from the river, (record, 132, 133;) and that said Secretary, on the 10th June, 1881, approved in behalf of Louisiana a list of swamp land selections of land in said Conway claim to the amount of 11,879.96 acres. (Record, 58–117.)

On the above proof and admissions the cause was submitted (record, 154), and on June 16, 1882, a final decree was rendered dissolving the injunction *pendente* and dismissing the bill, and complainants brought this appeal.

The third case in the court below was a bill pleading the same title and proceedings as in the foregoing bills, by the same plaintiffs, against T. J. Emler and a large number of squatters and trespassers, to enjoin them from cutting and removing the wood and timber on the back lands, which alone give them their chief value. It was met by general demurrer and at the hearing dismissed, and plaintiffs appealed. This is No. 916 here. In this case there was an ineffectual effort by complainants to require defendants, pending the bill, to give bond for answering for the value of timber, wood, &c., cut and removed, in which certain proceedings were had before a commissioner as to such value, &c. They appear in the record, but are unimportant, nothing having been practically effected under the rulings of the court requiring the complainants themselves to give bond to indemnify defendants against prospective loss and damage.

The fourth case, No. 917, was a suit at law, by the same plaintiffs, against one of the many trespassers, Charles Tschirn, to sequester and recover possession of a quantity of cypress timber in his possession, cut upon and in process of removal from the aforesaid lands and exceeding $5,500 in value. Title was derived as in the foregoing bills under the same laws, decisions, and proceedings. An order of sequestration was granted and a writ subsequently

issued, on bond given by plaintiffs, and the timber thereunder seized by the marshal and subsequently bonded by defendant.

Defendant then excepted substantially:

1st. That petitioners failed to show jurisdiction in the Circuit Court to try the cause.

2d. That petitioners failed to aver the particular land on which the logs were cut.

3d. That petitioners failed to exhibit a title to the land from which it was alleged the timber was cut.

4th. That plaintiffs not appearing to be in possession, no right of recovery existed until ejectment had established their right, and on these exceptions prayed dismissal.

Afterwards the following exceptions to the sufficiency of the order and writ of sequestration were filed:

1st. That petition was not verified by all plaintiffs shown to reside in the district, and that it did not appear any of them were absent from the State or district when the affidavit for the writ was made by their attorney and agent.

2d. That said affidavit was made without authority of law, and before an officer not authorized by law to administer oaths in proceedings before the Circuit Court. And, finally,

3d. That the bond for the order and writ was not made and signed by all the plaintiffs, and was insufficient in law, and did not satisfy the order granting the writ.

Whereupon it was prayed that the order be set aside, the writ quashed, and the seizure discharged.

On these exceptions the cause was heard by the court and the order set aside, the writ and seizure quashed, and

petition dismissed, and from a final judgment to that effect plaintiffs brought error. Under the peculiar practice in Louisiana the exceptions first set forth were equivalent to a demurrer in chancery, and hence they took the petition for confessed. The petition charged that defendant controverted and denied the title of plaintiffs in said lands, contending they belonged to the United States and State of Louisiana under the act of 1860, repealing the confirmation, and other legislation.

All of these four cases were tried by the district judge, who held, in reasons orally assigned, that as no patent had issued under the provisions of the act of 1858 to enforce its terms, the fee simple remained in the United States, under the authority of Wilcox *vs.* Jackson (13 Peters, 498), and hence it was within the power of Congress to revoke the confirmation. In all the complainants make title under William Conway, who held under Maurice Conway the grantee under Spain, and claim under the acts of Congress and proceedings thereunder set forth at length in the bills and petition.

No evidence was ruled out or admitted against objections; there was no finding of facts by the court, the issues being issues of law in all the cases, and no written opinions or reasons for judgment. In this condition of the records the following is believed therefore to be a compliance with the spirit of Rule 21 as to assignment of errors here:

Assignment of Errors.

In all the four cases—Nos. 587, 588, 916 and 917—the court erred in holding that the grant made by the second section of the act of June 2d, 1858, being unsupported by patent on the 21st June, 1860, was revocable by Congress without due process of law and without reasonable compensation, and in dismissing the bills accordingly. In the law case (No. 917) the court erred in setting aside the order and writ of sequestration and discharging the seizure on the grounds set forth in the exceptions to the sufficiency

thereof filed by defendant and heretofore substantially stated; and further erred in dismissing the petition and denying the relief therein sought.

Questions Involved.

I. *Was the confirmation by the act of* 1858, *though unsupported by patent, a grant of the lands described in the Commissioner's decision, No.* 125, *of March* 3*d*, 1806, *and beyond the power of Congress thereafter to repeal?*

II. *Was such confirmation co-extensive with the claim of William Conway before the old board of commissioners, and did that embrace all the land within the side lines prolonged to the Amite and lake Maurepas?*

III. *Was the claim forfeited and reannexed to the domain by reason of non-suit under the act of* 17*th June*, 1844?

IV. *Did the swamp land grants of* 1849 *and* 1850, *or either of them, embrace the claim?*

V. *Were these suits within the jurisdiction of the Circuit Court, and can the relief prayed and judgment asked be granted by the judicial department?*

Argument.

I. *Was the confirmation by the act of* 1858, *though unsupported by patent, a grant of the lands described in the Commissioner's decision, No.* 125, *of March* 3*d*, 1806, *beyond the power of Congress to thereafter repeal?*

Some confusion in the various opinions and decisions about the Houmas controversy, manifests itself from the confounding the two distinct grants of 1774 and 1777, the former to Conway and Latil for the specific depth of 40 arpens in confirmation of the Indian sale of 1773, the latter to Conway alone for the vacant land in the rear of the other. Even the Attorney General seems to have con-

founded them (4th Opinions, 714). We shall understand them better if we keep them distinct.

William Conway, early in 1806, filed his notice (record, p. 113), and evidence of claim to the lands described, before the board of commissioners for the eastern district of the then territory of Orleans, and on or about the 3d March of that year said board made the following decision thereon:

"*No.* 125. *William Conway claims a tract of land situated in the county of Acadia, at a place called Houmas, on the left bank of the Mississippi, containing* 22½ *arpents front, with an opening towards the rear of* 60° 45', *the upper line running North* 9° 15' *East*, 351 *arpents, and the lower line directed North* 70° *East, and measuring* 455 *arpents, bounded on the upper side by Daniel Clark's land, and on the lower side by the land of Simon Laneau.*

"*It appearing to the board, from a patent or complete title exhibited, that* 17 *arpents front were, together with a greater quantity, granted by the Spanish government to Maurice Conway,* 21*st June*, 1777; *and it appearing that the* 5½ *arpents of front remaining of the land aforesaid were purchased by Pierre Part, at the public sale of the estate of the late Joachim Miro (alias Belony) on the* 7*th day of December*, 1788; *and it further appearing to the board, from the several instruments of conveyance offered in testimony, that the two tracts of land aforesaid have been conveyed to the present claimant, the board do hereby confirm his claim aforesaid.*"

According to law the report containing this decision was, on the 9th January, 1812, by the Secretary of the Treasury, laid before Congress for its final action thereon; (record, p. 67), (see American State Papers, Public Lands, vol. 2, p. 224, Duff Green's ed). The decision itself is found on p. 287.

Does the descriptive language of the 2d section of the act of 1858 embrace this decision? It refers to favorable decision made by Grimes, Lewis, and Robertson, as com-

missioners. The report shows, p. 287, that Robertson was not a member of the board when the decisions were made, and that, so far as he had a right to do so, he afterwards, on becoming a member, dissented from them. The framer of the act was doubtless misled by the fact that on the last page of the report, 367, which page is specially referred to in it, all the names of the three commissioners appeared as signers of the report. But this is immaterial. The reference is to decisions by them *as commissioners*, not as private individuals, and when we see that by the act of March 2d, 1805, sec. 5 (2 Stats., 324), creating the board and defining its powers, it was to consist of three commissioners, and a majority was authorized to make such decisions, we must infer Congress meant decisions by the *board*, and not by the individuals, and that if a majority constituted the board, and such majority had made a decision in a given case, it was a lawful one under the act of 1805, and was, therefore, within the act of 1858. Any other argument would exclude, and for no other reason at all, a great many decisions made by the two commissioners during the vacancy subsequently filled by Robertson, and some afterwards made by Grimes and Lewis, by Grimes and Robertson, and others still by Lewis and Robertson. Two Commissioners of the General land office take this view of it. (Record, 67, 139.)

It will be observed the letter of the Secretary of the Treasury of January 8, 1812, same Vol. State Papers, p. 224, transmitting the report to Congress, refers to it as embracing claims *not* confirmed by the commissioners. But the *report* itself, as transmitted, really embraced both claims confirmed and claims rejected, and the printed publication in the State Papers is a true copy of that report, and has never been questioned as such. The Commissioner of the General land office, in his decision above referred to, says on this point: "As to the next objection, while the letter of the Secretary of the Treasury, transmitting the reports of the commissioners to Congress, did not refer specifically

to the claims which had been confirmed by the commissioners, but only to those which had not been so confirmed by them, yet the report so transmitted embraces claims confirmed as well as those rejected; and the claim of Conway, upon which the commissioners made a favorable report, having been embraced in that report, within the pages in the American State Papers, mentioned by the said act of 1858, was confirmed thereby."

Whatever force there might be in these differences between the description and the thing described amounts to nothing substantially when recourse is had to the other words of description, as to which there is and can be no doubt. The edition of the State Papers by Duff Green was authorized by law, and was made, or published, in 1834: (Act 2d March, 1831, 4 Stats., 471: Joint Resolution No. 6, of 10 July, 1832, Sec. 1, 4 Stats., 606: Act of 3d March, 1837, Sec. 1, 5 Stats., 171–174.)

They are, in all courts and elsewhere, full proof of the original papers they contain; (Watkins vs. Holman, 16 Peters, 25: Brayant vs. Forsyth, 19 Howard, 34.) Volume 2 was published in 1834, and was before Congress when the act of 1858 became a law. Indeed the direct reference to the book in the 2d section proves this. The claims then, intended to be confirmed by the section, are further described as those upon which favorable decisions are found between pages 224 and 367, inclusive. When we find the decision on William Conway's claim therefore is a favorable one, and is found on p. 237 of that volume, which certainly is a page betwen 224 and 267, is not the description, if doubtful before, now bereft of all doubt?

The proviso "*That any claim so recommended for confirmation, but which may have been rejected in whole or in part, by any subsequent board of commissioners, be, and the same is hereby, specially excepted from confirmation,*" does not affect this claim, because no subsequent board of commissioners have ever passed upon it in any manner. Upon this point the Commissioner of the Land Office, in his decision last

above referred to, says, (record, 138:) "The report of the commissioners on the claim of Conway appears in page 287 of volume two, American State Papers, (Duff Green's edition), within those mentioned in said confirmatory act, and the same has not been rejected by 'any subsequent board of commissioners'; the unfavorable report thereon by the Commissioner and Solicitor of the General Land Office not being considered as the action of a board of commissioners."

"The report shows that the commissioners favorably considered the claim to its full extent: the confirmatory act of June 2, 1858, affirms it and necessarily covers all the land thus claimed and embraced in this decision."

In that decision the Commissioner admits the second section of the act of 1858 embraces the Wm. Conway claim, and confirms it to the full extent claimed before the old board in 1806, and with the limits set forth in these suits. And on appeal the Secretary of the Interior, although he overrules him as to his opinion upon the depth of the claim as a complete Spanish grant, valid under the treaty of 1803, sustains him upon every other point. (Record, p, 62.) Both of these officers are candid enough to admit that the act of 1858 acts upon and confirms the title with limits as claimed before the commissioners, but declare that the repeal by the act of 1860 is mandatory upon them and not to be disobeyed by executive officers upon an allegation of unconstitutionality.

And this brings us to the inquiry: Was the act of 21st June, 1860, (12 Stats., 866,) an exercise of legislative power sanctioned by the Constitution of the United States?

Had the 2d section of the act of 1858 been ambiguous a subsequent act defining its meaning would bind all parties and all courts, not as a statute repealing a grant once vested, but as a statutory declaration that none had vested. But the repealing act does not pretend to construe the act of 1858, but rather affords additional evidence that it did confirm and was intended to confirm the Conway claim.

It repeals the 2d section "and all other parts of said act which relate to lands in Louisiana *confirmed* by said second section." We are then to deal with the repeal as an undisguised revocation of the estate vested by the second section; as an attempt by a mere legislative enactment, without charging any crime against the owners of the lands, without legal proceedings against them, to take their property for public use, against their consent, and without compensation. In Cooley's Constitutional Limitations laws of this nature are treated at much length, and the duty of the judge to pronounce them null abundantly shown. See chapter 8, and especially pages 169–176.

In the leading case of Fletcher v. Peck, (6 Cranch, 87,) the court declared that a grant differed in nothing from a contract executed, and that for a party to pronounce his own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power, which must find its vindication in a train of reasoning not often heard in courts of justice, p. 132. This was said of the State of Georgia, whose legislature had made a grant of a large quantity of her vacant lands to James Gunn and others. By mesne conveyances a portion of these lands became the property of Peck, who sold to Fletcher under certain covenants of right in Georgia to convey, and of actual conveyance by the act referred to. Time rolled on, and, as in the case at bar, a subsequent legislature revoked the grant, such action being the result of great excitement in the State and a discovery of evidence showing many members of the former legislature acted from impure motives in voting for it. But the court would not sanction such a mere act of power. On p. 133 it said: "If the legislature of Georgia was not bound to submit its pretentions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is uni-

versally acknowledged, that ought not to be entirely disregarded.

"If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will."

Page 134: "If the legislature felt itself absolved from those rules of property which are common to all citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may devest any other individual of his lands, if it shall be the will of the legislature so to exert it."

Page 135: "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power: and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question, whether the act of transfering the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection."

Page 136: "In considering this very interesting question, we immediately ask ourselves, what is a contract? Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed. An

executory contract is one in which a party binds himself to do, or not to do, a particular thing. * * * A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. * * * A grant in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant." The decision is full of such expressions.

The 5th Amendment to the Federal Constitution provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This provision has been passed upon in the following, among other cases: Pumpelly vs. Green Bay Co., 13 Wal., 177; Osborn vs. Nicholson, ibid, 662; West River Bridge Co., vs. Dix, 6 How., 507; *Mitchell vs. Harmony*, 13 *How.*, 115; Murrays, Lessee, vs. Hoboken Land Improvement Co., 18 How., 272.

The amendment can find no more appropriate field for its exercise than is presented by the facts of this case. Those facts show the wisdom of the people in demanding an amendment of its character. Its most ardent advocates can hardly be supposed to have foreseen a clearer necessity for such an amendment than Congress themselves furnished when they voted away, by a majority of each House, the lands of the plaintiffs here and those under whom they derive their respective rights.

The history of those times tells us, in a desultory way, that Mr. Benjamin and Mr. Slidell, Senators from the State of Louisiana, had been accused by their political rivals of having private interests in the Houmas title, and that by unfair practices on their part the act of 1858 was adroitly passed. Large numbers of people, possibly more than 1,000 voters, had, under one pretense or another, fastened themselves upon the Houmas lands, and of course

they and their sympathizers wielded much influence in elections for congressmen and members of the legislature. A great hue and cry was raised; public meetings were held, and the customary resolutions passed, holding up to public scorn all who took any part in the great wrong which was to make the rich richer and the poor poorer. Large sums of money were raised among the incensed squatters, and special counsel engaged to go to Washington and demand the immediate repeal of the confirmation. The assessment was $10 on each settler. Mr. Miles Taylor, then member of Congress from the district embracing the theatre of war, led the onset.

The attack began in the Senate, where the petition of the settlers and squatters demanding the repeal, and the remonstrance of the Houmas claimants protesting against it, were submitted to a select committee, who, on 23d March, 1860, through their chairman Mr. Toombs, of Georgia, made a report deliberately declaring that the confirmation by the act of 1858, "gives a great and unjust advantage to the claimants, for which your committee see no sound reason, either in justice or sound policy. It gives the Houmas grantees *paramount title* to the lands in dispute, and requires all adverse claimants to make good their title by suits at law," etc. This celebrated paper is called "*Toombs*' report." It concluded thus: "Your committee, therefore, recommend that the second section of the act of 2d June, 1858, and also so much of the 3d section as refers to the second, be repealed, and that the title of the claimants under the Houmas grant be *judicially* settled, and for which purpose they herewith report a bill." But the part of the bill allowing the courts to pass upon the question was carefully omitted from the act as passed!

The report is Senate Committee Report No 150, 36th Congress 1st session, and contains, as an appendix, the opinion of the Attorney General of 31st December, 1847, (4 Opinions, 643;) also a very able argument by Mr. Louis

Janin, a land lawyer of great talents and research, in which he showed the committee and Congress, not only that they were totally without power to revoke the grant of 1858, but that such grant was in itself right, and nothing more than a fulfillment, and a very tardy fulfillment, of the obligations assumed by the United States under their treaty with France of 1803.

Despite all this, however, the wrong was deliberately consummated, and, as might have been foreseen, has drawn into its trail an array of consequences which have kept to this day a vast extent of fertile and valuable country, in the heart of the State, and within sixty miles of the southern metropolis, in a state of primitive wildness, destitute of schools, churches, or decent habitations, whose inhabitants feel no interest in aught but a constant warfare against the rights of others, and where little is known of or cared for the laws of God or man.

Had the Congress desired to curse that part of Louisiana; had it sought to involve in a common ruin the five hundred families declared by Mr. Toombs to be then resident there, and now probably embracing four thousand souls, it could not in all the profundity of its wisdom have devised a more consummate engine for the purpose than the act of 21st June, 1860.

With all its extravagance Toombs' Report does not so much as support by an insinuation the charges of trick and concealment which had resounded through Louisiana and had brought down upon her Senators the wrath of the people whose usurped possessions on the Houmas grant had been jeoparded by the act of 1858. Can any fair mind believe the report would studiously have avoided this, the strongest point in the case of the squatters, had there appeared the slightest evidence of its existence? But if it had been otherwise, if the foulest practices had been resorted to in the enactment of the act of 1858, and the Congress had possessed proof to that effect, still the grant thereby made

could not, even by the courts, much less a succeeding Congress, have been revoked on that ground.

The decision in Fletcher vs. Peck, (6 Cranch, 130,) is directly to the point that no court can inquire into the motives of a legislative body in passing a law for the purpose of defeating rights which have vested under it. Judge Cooley says in all cases the question of constitutionality is one of power, not of legislative discretion or motive. The courts must presume the latter are pure. See Cooley's Cons. Lim., 186, and notes. It is settled in this country an act of Congress cannot be impeached by the courts or a succeeding Congress for impure motives or unwise exercise of discretion influencing its passage.

In Strother vs. Lucas, 12 Peters, 454, it was said: "That a grant may be made by law as well as by a patent pursuant to a law is undoubted, and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*;" and see Sims vs. Irvine, 3 Dallas, 456; Chouteau vs. Eckart, 2 How., 374.

In LeBois vs. Bramell, 4 How., 463, it is said: "A confirmation of a French or Spanish claim, either by a board of commissioners under the act of 1807, or by Congress directly, or by the district court by force of the act of 1824, is a location of land by a law of the United States. A grant of land by an act of the legislature vests an actual seizin in the grantee." (Enfield vs. Permint, 8 New Hamp., 515.)

"The grant in such a case is a public act, much better calculated to give notoriety to the conveyance than an actual entry upon the land by an agent of the State or by the grantee. And this notoriety of the grant is, in contemplation of law, equivalent to an entry by the grantee." (8 Cranch, 246, 248; Coke, 94; 3 Green, 441, Hill vs. Dyer.)

"By the confirmation the title became complete." (Bissell vs. Penrose, 8 How., 381.)

In Judge Sharswood's Note to Blackstone, vol. 2, p. 346, he says: "In the United States the bills of rights contained in the various State constitutions impose real and effective limitations upon legislatures, and any act may be declared void, not because it is against reason, but because it is in violation of the Constitution. In most, if not all, these bills of right is contained the provision that no man can be deprived of his property unless by the judgment of his peers or the law of the land, and by 'law of the land' is meant some general law establishing a rule for the community at large. Property can only be taken for a public use, and that upon compensation made. It is not competent to the legislature to take the property of A and give it to B. (Hoke vs. Henderson, 4 Devereux, N. C. Rep., 1; Jones' Heirs vs. Perry et al., 16 Fayer, 50; in the matter of John and Cherry Streets, 19 Wend., 659; Wilkinson vs. Leland et al., 2 Pet., 627; Norman vs. Heist, 5 W. and S., 171.) "Private acts of the legislature are, however, frequently obtained to enable trustees to convert real into personal property, or, in general, to change investments; and such acts have been held constitutional and valid. (Norris vs. Clymer, 2 Ban., 277.) In these cases a change of the subject matter for the benefit of all interested is effected, but no change in the right or title of any of the parties. Whenever such a change has been attempted, the act has been declared unconstitutional and void." (Norman vs. Heist, 5 W. and S., 171; Bumberger vs. Clippinger, 5 W. and S., 311; Rogers vs. Smith, 4 Barn., 93; Brown vs. Hummel, 6 Barr., 86.)

It is unnecessary to go further in this direction. Authorities from the Federal courts, from State courts, from elementary writers, and from foreign courts, especially in England, might be multiplied to show that the second section of the act of June 2d, 1858, was a grant to Wm. Conway, and those holding under him, of the lands affected by his claim, and that afterwards it was no more competent for the party making it to pronounce it void,

and reassert their right to the lands, than it would be for it to pronounce void all the sales, donations, and confirmations it has ever made to States, corporations, and individuals, and to reassert their title to the lands affected by them.

By the 8th section of the act of Congress of 22d July, 1854, (10 Stats., 308,) the duty and power of ascertaining the origin, nature, validity, and extent of private land claims in the territory acquired from Mexico by the treaty of Guadalupe Hidalgo, were vested in the Surveyor General of New Mexico, who was required to report the same to Congress for final action. In one of his reports he included the claim "No. 14, of Charles Beaubien," for an immense region of country, now situated in Colorado, granted to his authors by the colonial Mexican authorities prior to cession, and which he recommended for confirmation thus: "The grant is therefore approved by this office, and transmitted to the proper department, with the recommendation that it be confirmed by the Congress of the United States." (See Tameling *vs.* U. S. Freehold, etc., Co. 3 Otto, 659.) By sec. 1 of the act of 21 June, 1860, it was enacted "That the private land claims in the territory of New Mexico, as recommended for confirmation by the surveyor general of that territory in his letter, etc., * * designated as numbers * * 10, 12. 14, 15, * * be, and they are hereby confirmed." (12 Stats., 71.)

The title under this grant, thus confirmed, came before this court under a writ of error to the supreme court of the territory of Colorado in the case above cited, 3 Otto, 644, in which the question at issue was the effect of the confirmation upon the original grant, that being conceded to have been enormously in excess, as to quantity, of the power of the Mexican authorities to grant. The court said, p. 633, "Congress acted upon the claim as recommened for confirmation by the surveyor general." "The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and

operative for the entire tract. The plaintiff in error insists that, under the Mexican colonization laws in force when the grant was made, not more than eleven square leagues for each petitioner could be lawfully granted. As there were in the present instance but two petitioners, and the land within the boundaries in question is largely in excess of that quantity, the invalidity of the grant has been earnestly and elaborately pressed upon our attention. *This was matter for the consideration of Congress; and we deem ourselves concluded by the action of that body.* The phraseology of the confirmatory act is, in our opinion, explicit and unequivocal."

In Ryan et al. vs. Carter et al., supra p. 78, it was recognized and enforced as the settled doctrine of this Court, "that such an act passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by a law as well as by a patent pursuant to law."

It is worthy of special notice that the confirmation in this case, as in that by the act of 1858, was only a quit claim or relinquishment by the United States, and so expressly declared. See sec. 4, 12th Stats., 71.

We invite attention to the two cases of Stodard vs. Chambers, (2 How., 284,) reaffirmed in Mills vs. Stodard (8 How., 345,) and Bissell vs. Penrose, (8 How., 331.) They arose out of private land claims confirmed by the Missouri Act of July 4th, 1836, (5 Stats., 126.) This act was the parent of much litigation in that State. We call especial attention to it because it is the model of the Act of 1858, the third section of the latter incorporating the third section of the former word for word, or nearly so.

In Stodard vs. Chambers, an incomplete Spanish concession, granted in 1800, surveyed in 1806, filed with the commissioners under the acts of 1805, 1806, and 1807, rejected in 1811, filed before another board in 1835, by them reported for confirmation, and by the

act of 1836 confirmed, came in partial conflict with a New Madrid location made in 1818, on which a patent issued in 1832. No patent had issued on the confirmation of the Spanish concession. The court held the confirmation itself a complete appropriation and grant of the land on the ground that the patent had issued for land reserved from location with New Madrid certificates. It said (p. 316, 2 How.): "*A confirmation by act of Congress vests in the confirmee the right of the United States, and a patent, if issued, could only be evidence of this.*" "If the claim of the defendant had not been interposed, no one could doubt the validity of the plaintiff's title. *It has the highest sanction of the government, an act of legislation.*" This case was re-examined and the decision reaffirmed in 8 How., 345, and supporting authorities cited. In Bissell vs. Penrose, the facts are precisely the same, except that the act of 1811, 10th section, (2 Stats., 665,) is dwelt upon as protecting the private claim from disposition pending the inquiry of Congress into its legality. The confirmation by the act of 1836 is held to have been a grant, without patent. In this case the court will find the fullest reply (pp. 333 to 338) to the objections urged against the survey of Lafon, upon the ground that it was unauthorized by law and a mere private survey. In addition to these cases we cite as analogous ones, Barry vs. Gamble, (3 How., 53;) *Grignon's Lessee vs. Astor*, (2 How., 319;) Enfield vs. Permint, (8 New Hamp., 515;) Doe vs. Eslava, (9 How., 447;) Wilkinson vs. Leland, (2 Pet., 627, and remarks of the court, on p. 657;) Tennett vs. Taylor, (9 Cranch, 43;) Patton's Lessee vs. Easton, (1 Wheat, 487;) Sims vs. Irvine, (3 Dal., 456;) Chouteau vs. Eckart, (2 How., 374.)

The first section of the act of 1836 confirming claims is similar to the second of the act of 1858. The latter is evidently taken from it. "That the decisions in favor of land claimants made by, etc., * * * *be and the same are hereby* confirmed—saving and reserving, however, to all adverse claimants the right to assert the validity of

their claims in a court or courts of justice." If these words in the one were a present grant of the lands in the Missouri cases, as we have seen they were held to be, why are they not in the other in the Louisiana cases? They are precisely the same. The two statutes had a common purpose—the legislative confirmation of claims having root in the Spanish and French Governments in one and the same province, acted upon by Boards of Commissioners and submitted by them to Congress for its final action.

That the act of 1858 was a confirmation and plenary grant, no officer of the Government has ever denied. The very language and intent of the repeal admit this necessarily.

The second and third sections, the only portions applying to Louisiana, are as follows:

"SEC. 2. *And be it further enacted, That the decisions in favor of land claimants made by P. Grimes, Joshua Lewis, and Thomas B Robertson, commissioners appointed to adjust private land claims in the eastern district of the Territory of Orleans, communicated to the House of Representatives by the Secretary of the Treasury on the ninth day of January, one thousand eight hundred and twelve, and which is* (are) *found in the American State Papers, Public Lands* (*Duff Green's edition*), *volume two from page one hundred and twenty-four to three hundred and sixty-seven, inclusive, be and the same are hereby confirmed, saving and reserving, however, to all adverse claimants the right to assert the validity of their claims in a court or courts of justice; Provided, however, That any claim so recommended for confirmation, but which may have been rejected, in whole or in part, by any subsequent board of commissioners, be and the same is hereby specially excepted from confirmation.*

"SEC. 3. *And be it further enacted, That the locations authorized by the preceding section shall be entered with the register of the proper land office who shall, on application for that purpose, make out for such claimant, or his legal representative* (*as the case may be*), *a certificate of location, which shall be transmitted to the Commissioner of the General Land Office; and if it shall appear*

to the satisfaction of the said commissioner that said certificate had been fairly obtained, according to the true intent and meaning of this act, then, and in that case, patents shall be issued for the land so located as in other cases; and for each and every certificate, as aforesaid, issued by the register of any land office, he shall receive the sum of one dollar, &c."

If the second section did not, in thus confirming the decision on the Conway claim, grant the lands affected by that decision, then it can only be because the requirements of the third section were intended in some way to suspend, until complied with, this effect, and to postpone the vesting of a title to a future time. It is admitted these requirements, though complied with, had not ripened into patent before the repeal. And the doubt is, if this fact enables the grantor to interpose, and, by receding from his advance, reassert his right. We think this question must be decided in our favor. We do not stop now to inquire if the act of 1858 actually embraced the Houmas claims. It has been thought by a few lawyers that as section two confirmed decisions made by Grimes, Lewis *and* Robertson, a literal rendering of the section would exclude them. But this view has never been held by the land department of the Government. In his decision of 11th January, 1859, the Commissioner of the General land office (see his letter of that date to the Secretary of the Interior), (record, 67,) discusses this point, and thinks it has no weight. The Secretary in his letter to the Commissioner of December 10, 1860, impliedly assents to this. (Record, 69.)

The Commissioner also, in 1877, in his letter to the Secretary of the Interior of 22d June, dwells on the point and holds it too clear the second section embraced the Houmas claims. (Record, 139.) But perhaps the most conclusive argument on the point is that Congress itself, by the act of 1860, admits the confirmation by the second section. Else, why the act of repeal?

There are some fifteen hundred claims on which, about the years 1806, 1807, and 1809 the commissioners had

rendered their favorable decisions, which were reported to Congress about 1812, and are to be found within the pages, volume, and edition of the State Papers described in the act of 1858. An examination will show the majority are signed by only two of the three commissioners at the particular time constituting the board. This was sufficient, as the act of 1805, sec. 5, (2 Stats., 324,) organizing the board, declared a majority might make decisions. These decisions, for or against claims, by the same section were subject to the final action of Congress. That final action, strange to say, was delayed until 1858. And we are to look upon it in its effect upon the Houmas claims more as an approval by an appellate authority of a judgment of an inferior special tribunal than as the creation of a new right.

Recurring now to the second section, we see that its language is, "*That the decisions be and the same are hereby confirmed, saving and reserving, however, to all adverse claimants the right to assert the validity of their claims in a court or courts of justice.*"

This was an unconditional decision in favor of Conway for all he had claimed in his written notice of claim. (Record, 113.) The argument admits this which is driven to the third section for the supposed limitation. That declars "*that the locations authorized by the preceding section shall be entered with the register of the proper land office,*" etc.

It was held in LeBois vs. Bramwell (4 How., 463) that a confirmation of a claim by commissioners, or by Congress, "is a *location* of land by a law of the United States." And this harmonizes with reason, because the confirmation not only recognizes the title and gives it validity, but attaches it to a specific parcel of land, viz., the tract embraced in the survey or specific natural boundaries. This is "*a location.*" It is the placing, the fixing, by competent authority a title whose place or fixedness had not been previously authorized. In other words, it is a "location authorized by" law. Hence, when section 3 of the act of

1858 says: "*The locations authorized by the preceding section shall be entered with the register of the proper land office,*" it meant that the claims confirmed by the preceding section, and whose boundaries, area and extent were thus established and fixed, should be so entered. The locations themselves were already made, for the language of the section is "*locations authorized by the preceding section.*" But section 2 authorized no locations at all, save, as we have argued, by confirmations of claims, whose surveys or descriptions gave them fixedness.

The section professes to do nothing but confirm *decisions* of the commissioners, and has no reference to locations. Section 3 therefore can only mean by the words "locations *authorized* by the preceding section" such locations as resulted from the confirmation of decisions by that section. Now, it cannot be denied that the favorable decision on the Conway claim by the commissioners did give that claim a specific location. It attached it to a certain parcel of land, and to none other.

The act of 1805, section 4, required Conway to deliver "a notice in writing stating the nature and *extent* of his claim, together with a *plat of the* tract claimed," and section 5 made it the duty of the board "to hear and decide in a summary manner, *all matters respecting such claims.*" They did so; and decided, in Conway's claim, that "it *appearing* to the board *from a patent or complete* title *exhibited,*" that he was the owner of a certain definite tract of land, whose limits they proceed to fix with precision, he should be confirmed in his claim thereto. Was not this a location of the claim? It would be an abuse of terms to hold otherwise. But, it is said, the commissioners had no authority to confirm, and hence none to locate, a claim. This we admit, except as an advisory board, and subject to the action of Congress. But in 1858, Congress acted and confirmed the decision in all its parts. And as that decision was a location of Conway's claim, as we have shown, by what process of reasoning can it be held the confirmation

of the decision was less? The opening language of section 3 will admit of no other construction.

It is only necessary to call attention to the fact that no part of the act requires or contemplates the survey of claims confirmed by it previous to the issue of the patents. Nothing could more plainly manifest the intention of the law to recognize the surveys and locations under which the respective claims had been preferred before the commissioners, and by which they had been examined and tested, and according to which they had been favorably decided.

The Commissioner of the General land office, in his letter to the Secretary of the Interior of January 11th, 1859, distinctly says, in answer to the arguments of Mr. Miles Taylor that Lafon's survey had no authority of law for it, that it was competent for Congress to validate it and give it full effect, and that it did so in confirming the decision founded upon it (record, 68). In the cases of Bissell *vs.* Penrose (8 How., 317), and of Mills *vs.* Stoddard (do. 345), the same question arose as to the private surveys founding the claims confirmed by the act of July 4th, 1836, (5 Stats., 126). It was held that if Congress had confirmed a located claim, it also had confirmed and legalized the survey under which sueh claim had been preferred before the commissioners. If, then, the previous surveys by Lafon and others, as set forth in the bill in this case, were validated by the second section, and that amounted to a "location authorized by" said section, the third section cannot be understood as requiring any other locations. Because the location was authorized (that is, had been made in every case of a surveyed claim), already by the second section. This must be the meaning of the third section, because, it will be observed, the register is directed in mandatory terms to issue his certificate of location. He had no discretion in the matter. "He *shall* issue to the claimant" his certificate, is the language of the section. If the location had been authorized and made by section 2,

this was proper. But if the claimant was to make it according to his interests or caprice, then it would have been wrong and dangerous to rob the register of discretionary power to refuse his certificate. This view is strengthened by the fact that the same section plainly gives the Commissioner of the General land office full discretion in the premises when the certificate is presented to him as the basis of patent. Before issuing the final evidence of the grant, it was proper that such high authority should be satisfied the certificate had been fairly obtained. Accordingly, we find such officer did review the case very fully, and coming to the conclusion the certificate in the Conway case had "been fairly obtained according to the true intent and meaning of" the act, he held the applicant entitled to patent. See his letter of January 11th, 1859, to the Secretary of the Interior (record, 66). On the 13th November, 1858, the surveyor general for Louisiana issued his special "patent plat" on the Conway claim (record, 36). On the 15th November, the register at New Orleans issued his patent certificate on the claim, testifying to its confirmation by the act of 1858, and giving it a "specific location" by section, township and range, fixing its area at 123,-516.90 acres, and that the confirmee was entitled to patent (record, 36). On November 17th, Mr. John Slidell made written application for patent to the officer provided by the act to issue it, as we have seen, if satisfied all these things had been fairly done (record, 36). We have seen this officer was fully satisfied. More than that. His superior, the Secretary of the Interior, was satisfied (record, 69). But the patent did not issue. Why? The repeal denied those officers the right to issue it. It confessed the confirmation by the act of 1858, and took from high public officers the power to grant the usual evidence of such confirmation.

Now, we think no one will contend the *right* to the patent was not complete when this repeal took place. This is undeniable and we believe undenied. But if so, then it is settled law that the courts, certainly in equity, will re-

gard the patent as issued and adjudicate rights accordingly. In Lytle vs. Arkansas (9 How., 314) an applicant for a mere pre-emption right, having done all the legal acts required of him as to filing notice, making proof and payment, and having been thwarted in them, or some of them, by the erroneous construction by the land officers of the law in the case, the land was subsequently selected by the governor of Arkansas under a grant made to that (then) territory by the act of 15th June, 1832, and was subsequently patented. The court held (p. 333): "It is a well established principle that when an individual in the prosecution of a right does everything that the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

"This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloys or his representatives had been permitted by the land office to do what, in this respect, was offered to be done."

In Lindsay vs. Hawes (2 Black., 554,) the unpatented pre-emption entry of Lindsay, made in 1839 and cancelled in 1845, prevailed against the entry of Hawes, made in 1845 and patented in 1848, upon the ground that, having done all in his power to perfect his right and all the law required him to do, and having lost his land by the erroneous construction of the law by the land department, the patent should have issued to him and not Hawes. The decision proceeds upon the principle that his right to a patent having been complete, equity should deal with him as it would do had it in fact issued. In Cunningham vs. Ashley (14 How., 377) the case was stronger, and is referred to on p. 557 of the one just cited. Cunningham had ineffectually claimed the right of pre-emption on a tract of land without being permitted to make proof or payment. No certificate had ever been granted him. The defendants

had been allowed to enter and had received a patent. Cunningham for twenty years carried on his opposition before the register and receiver, the Commissioner of the land office, the Attorney General, and the Secretary of the Interior, each and all deciding against him. After patent to his adversary he sued in equity. The court held that having done all he could and all the law required, the title was in him. The case turned upon the principle contended for.

In Garland vs. Wynn (20 How., 8) the principle on which the case turned was the same, with the addition of fraud on the part of the defendant. Wynn proved his pre-emption right, entered the land and paid for it. Afterwards Hemphill preferred a pre-emption claim, which was allowed, the former entry of Wynn cancelled and his money refunded, and patent issued to Garland as assignee of Hemphill. The supreme court of Arkansas held that Garland held under the patent as trustee for Wynn, and this Court affirmed the decree. The same was done in Johnson vs. Towsley (13 Wall., 72).

But the case of Laugden vs. Hanes (21 Wallace, 521) concludes the matter. We ask especial attention to it, for it arose out of a state of law singularly like that of the cases at bar.

In ceding her northwest territory Virginia stipulated that the possessions and titles of the inhabitants should be conformed to them, and the United States took the cession subject to that pledge. By act of 26th March, 1804, 2) Stats., 277,) the register and receiver of the proper district were constituted commissioners to receive, examine, and report such claims to Congress.

Their duties and powers under the act were so like those of the commissioners under the act of March 2d, 1805 (2 Stats., 324,) who acted upon the Houmas grant, that it is probable the latter act was drafted from the former. They took cognizance of and confirmed the claim of Jean Baptiste Tongas, and placed it in their transcript of favorable

decisions, required by law to be submitted to Congress for its final action.

"By the act of March 3d, 1807, (2 Stats., 446,) this decision," says the court, (21 Wal., 529,) "and all other decisions in favor of persons claiming lands in the district of Vincennes, contained in the transcript transmitted to the Secretary of the Treasury, were confirmed. This confirmation was the fulfilment of the condition stipulated in the deed of cession, so far as the claimants were concerned. It was an authoritative recognition by record of the ancient possession and title of their ancestor, and gave to them such assurance of the validity of that possession and title as would be always respected by the courts of the country. The subsequent clause of the act providing for the issue of a patent to the claimants, when their claim was located and surveyed, took nothing from the force of the confirmation.

"In the legislation of Congress a patent has a double operation. It is a conveyance by the Government when the Government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights, because it also embodies words of release or transfer from the Government."

"In the present case the patent would have been of great value to the claimants as record evidence of the ancient possession and title of their ancestor, and of the recognition and confirmation by the United States, and would have obviated, in any controversies at law respecting the land, the necessity of other proof, and would thus have been to them an instrument of quiet and security. But it would have added nothing to the force of the confirmation."

The patent, however, actually issued in 1872 to enforce the confirmation of 1807, but the court held the fee had passed by the former, and sustained the title of the defendant, who fortified it by a prescription which could not have availed him against the fee had it remained in the Government till the date of the patent. "A legislative confirmation," say the court on p. 530, "of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quit-claim from the Government." "A confirmation," says Sheppard in his Touchstone of Common Assurances, "is the conveyance of an estate, or right, that one hath in or unto lands or tenements to another that hath the possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged." If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated."

The Secretary of the Interior and Commissioner of the General land office have both held the act of 1860, repealing the grant of 1858, unconstitutional.

The claim of Maria Malines was confirmed and reported by the same commissioners who confirmed and reported the Houmas cases, and is contained in the same report, (2d vol. State Papers, Green's ed., p. 279.) It was likewise confirmed by section 2, of the act of 1858, and came before the Commissioner of the General land office in 1874 on a question as to its extent and boundaries. In a decision of 23d June, 1874, he said, "It is also claimed that the 2d section of the act of June 2d, 1858, confirmed the claim in its entirety; and though such appears to have been the case, yet by the act of 21st June, 1860, this 2d section was

repealed. I express no opinion as to the right of the legislature thus to annul a confirmation. Still I am satisfied that such legislation binds this office, for it is not within the province of this branch of the Government to declare of no effect an act of Congress." Secretary Delano reviewed and modified this decision on March 1st, 1875, in which, speaking of the Malines claim, he said: "It also appears that it was included in the second section of the act of June 2d, 1858, and thereby confirmed to its full extent." He then continues: "A confirmation by a law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*." "(Strother vs. Lucas, 12 Peters, 411; S. P. Field vs. Seabury, 19 Howard, 323, 333.) A grant by Congress is higher evidence of title than a patent. (Grigon vs. Aster, 2 Howard, 319.) It is equivalent to a conveyance with livery of seisin. (Enfield vs. Way, 11 New Hamp. Rep., 520; Enfield vs. Permit, 5 New Hamp., 280; Wilcox vs. Jackson, 13 Peters, 438.)"

"Congress, however, on the 21st of June, 1860, (12 Stats., 866,) repealed this confirmatory section. This it was not competent for it to do. The authorities just quoted establish that a confirmation is a grant, and "a grant of land or of a franchise once made by a legislative body cannot be rescinded by the granting power." (Charles River Bridge Case, 7 Pickering, 446; Chitty on Prerog., 132; 3 Kent, 458; Fletcher vs. Peck, 6 Cr., 87; King vs. Amery, 2 T. R., 575.) "In such case, upon the authorities, a repealing act is void and of no effect." (Territt vs. Taylor, 9 Cranch, 44; Pawlett vs. Clark, 9 Cranch, 262; Rice vs. Railroad Co., 1 Black., 358.)"

"If the repealing act had attempted to take the property for public use it would have been void, because it made no provision for compensation. If it were intended simply to devest the owner of his estate, then it was in direct conflict with that provision of the Constituttion which declares that no man shall be deprived of his property except by due course of law; that is, by judicial proceeding. (2

Kent Com., 13; Wilkinson vs. Leland, 2 Peters., 657.) If any confirmation were necessary in this case, I think it has been made."

These rulings are published in Copp's Land Owner, vol. 2, pp. 21–23. So, too, a subsequent commissioner and Secretary impliedly admit the repeal void, but yet contend they should enforce it. (Record, 60, 139.) They place the statute above the Constitution and enforce as law what they admit to be void. They make the Constitution the supreme law of the land in theory, but a void enactment the supreme law in fact.

If the patent had been by the law designed to convey the fee, as in the case of sales and donations of lands whereof the fee was once in the Government. still, under the decisions and under principle, its wrongful refusal by the officers, whose plain duty it was to issue it, would in equity relieve against forfeiture; for it is sound principle that the decisions of the proper officers of the land department as to the facts founding or denying the right to a patent for lands, in the absence of fraud or imposition, is conclusive everywhere. (Quinby vs. Conlan, 104 U. S., 426; Baldwin vs. Stark, 107 U. S., 465, and cases cited.) The act of 1858 required no patent to vest the right; but, in harmony with the land system, provided one for the convenience and better security of the confirmee.

The claimants of the William Conway grant did all the law required. They applied to the "proper register of the land office," and filed with him the usual patent plat, certified on Nov. 13, 1858, by the proper surveyor general, and testifying the matters as to the survey, area, and location of the land usual in such instruments. (Record, 36.) With this plat, and the law, and the records of the commissioners before him, that officer granted his certificate of location, testifying to the tracts located in satisfaction of the grant, giving their area, and that the party was entitled to a patent on the presentation of both instru-

ments to the Commissioner of the General land office. (Record, 36.) The register then sent both patent plat and the certificate of location, as required by law, to the commissioner. That officer, a very able man, familiar with his duties and willing to perform them, was "satisfied" the certificate had been obtained, as the law required, "according to the true intent and meaning of" the law, and decided that patent shoud issue. His decision is in the record, pp. 66 and 69.

As the case had attracted so much attention, however, he thought proper to submit his decision to the Secretary of the Interior, where we may well suppose the joint resolution immediately following, of March 3d, 1859, (11 Stats., 442,) arrested its course. The repeal soon following, the Secretary, on December 10, 1860, wrote the commissioner, simply returning the papers and calling his attention to it. (Record, 69.) Thus, it is manifest, the facts entitling the Conway claim to a patent under the very terms of the law, had not only been performed, but the officer whose sole duty it was to issue it, if satisfied they had, was so satisfied, and would have issued it but for the revocation of the grant. No one denies this, and it is undeniable.

In equity, the right to a patent is equivalent to a patent issued. It was admitted by the district judge below, and must be so here, that if the patent had issued and been delivered the repeal would not have affected it. The land department refrains from confiscating the Daniel Clark and the Donaldson and Scott subdivisions of the grant, because the patents of 1844 are yet outstanding. (Record, 66.) And it is too clear they and the court below would have deemed a patent on the Conway subdivision beyond the power of repeal had one issued under the act of 1858. In other words, the record evidence of a grant by law, issued by an executive officer, is held of greater dignity than the grant itself.

If the Conway claim is shown to have been confirmed, all the decisions concur that the grant was complete, was of higher dignity than a patent, and beyond the power of repeal by Congress.

"A grant of land, by an act of the legislature, vests an actual seizin in the grantee." Enfield vs. Permint, 8 New Hamp., 515.

"The grant in such case is a public act, much better calculated to give notoriety to the conveyance than an actual entry upon the land by an agent of the State, or by the grantee. And this notoriety of the grant is, in contemplation of law, equivalent to an entry by the grantee." 8 Cranch, 246, 248; Coke, 94; 3 Green, 441; Hill vs. Dyer.

The act of 1860 involved an exercise by the legislature of judicial powers and the confiscation of the lands in the Conway claim thereby intended was not "due process of law."

"*No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*" Art. 5 of Amendments to Constitution.

"*The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.*" Art. 3, sec. 1, of the Constitution.

See authorities cited under these provisions. pp. 590, 591, and 594 in Pacific Railroad case, 98 U. S., 593; also U. S. vs. Lee, (106 U. S., 196.)

We next proceed to enquire:

II. "*Was such confirmation co-extensive with the claim of William Conway before the old board of commissioners, and did that embrace all the lands within the side lines prolonged to the Amite and lake Maurepas?*"

Under section four of the act of March 2d, 1805, (2 Stats., 324), it was the duty of Wm. Conway to file before the board of commissioners "a notice in writing, stating the nature and *extent* of his claim, together with a *plat* of the *tract or tracts claimed.*" This was done, and his notice is on pp. 113 & 114 of the record in No. 588, and is as follows:

"William Conway claims a tract of land situated in the county aforesaid, at the place called Houmas, on the left bank of the Mississippi, containing twenty-two and a half arpens in front on said river, with an opening towards the rear of 60 degrees and 45 minutes, the upper line running N. 9° 15′ E. three hundred and fifty-one arpents, and the lower line directed N. 70° E., and measuring four hundred and fifty-five arpents, bounded on the upper side by Dan'l Clark, and on the lower by Simon Laneau, *as more fully described in the annexed plat*, executed by Bartholomew Lafon, deputy surveyor, dated February 20th, 1806.

"Part of said land, that is to say, seventeen arpens front, were originally granted with a greater quantity by the Spanish government to Maurice Conway, by virtue of a complete title, issued on the 21st day of June, 1777, as per document No. 1, and the same conveyed to the claimant by the grantee aforesaid, on the 27th day of October, 1786, as per document No. 2.

"And the five and a half arpents remaining to the compliment of the 22½ aforesaid were transferred to the claimant on the 27th day of March, 1781, by Pierre Part, who had purchased the same at the public sale made before Louis Joudice, commandant of the parish of La Fourche, of the estate of the late Joachim Mire, (alias Belony,) on the 7th day of December, 1778, 'as it evidently appears by the authenticated document hereunto annexed, No. 3.'

"It is to be observed that although the deed of conveyance of Maurice Conway aforesaid contains 27 arpens front, the claimant only possesses seventeen, having disposed of the other ten in favor of Daniel Clark.

"WILLIAM CONWAY."

We have seen what the decision of the board was on this claim, and it is held it was not so broad as the claim itself, and as the act of 1858 was only a confirmation of the *decision*, the only land thereby granted was that embraced in its terms.

It is asserted that as the notice of claim described the land as 351 arpens on its upper and 455 arpens on its lower side lines, and as the decision followed such description, any excess of quantity in the rear of a right line uniting those points was not granted by the commissioners, and has ever remained public domain, and was therefore within the swamp grant to the State by the act of 1849.

The most obvious reply to this argument is that throughout the long investigation and scrutiny the case has undergone from 1806 to this time, no officer, court, or other authority, has yet given the point serious thought. On the contrary, it never was thought of at all, and was only injected into one of these cases by the chance discovery that the federal surveyors, in their accurate measurements of these lines, imputed to them lengths something greater than those expressed in Conway's notice and the decision aforesaid.

To afford its advocates the benefit of an argument built on the quibble, counsel in the suit against the State register agreed to draw a dotted line across the face of the 2nd plat opposite p. 36 of the record in that case, and to stipulate that, as near as protraction could do so, it indicated the the theory contended for. See stipulation on margin of plat. But there is nothing in the theory. Conway's notice must be construed as a whole and with reference to the grant of 1777 and his derivative titles thereunder, and the decision show us he submitted them all to the board as the law required him to do. They were the evidence, the record, on which the judgment proceeded, and if that be doubtful we must read it by the record.

The definition by Conway, of his side lines as 351 and 455 arpens in length, respectively, did not end his descrip-

tion. He continued, "Bounded on the upper side by Danl. Clark, and on the lower by Simon Laneau, *as more fully described in the annexed plat, executed by Bartholomew Lafon, deputy surveyor, dated Feb'y 20th*, 1806."

This plat, and the certificate of survey by Lafon, are in the record, pp. 92–93, and a translation of the latter on pp. 114, 115. Language and paper could not more plainly show they carried the grant of 1777 to the Amite and lake Maurepas. The very coloring of the plat (truly taken from the original), extends it to these natural boundaries. And the figures and letters on the plat agree accurately with the explanatory references in the certificate of survey.

Natural boundaries, as streams, lakes, mountain ranges, are favored in law as against imaginary lines in fixing limits to foreign grants. Cotton *vs.* Seavy, 22d Cal., 496; Jackson *vs.* Sprague, 1 Paine's Ct. Ct. Reports, 494; Perman *vs.* Wead, 6 Mass. Reports, 131; Holmes *vs.* Trout, 7 Peters, 171; Massie *vs.* Watts, 6 Cranch, 165; Bolton *vs.* Laun, 16 Tex., 110, 113; McIvers *vs.* Walker, (4 Wheat, 445;) Newsom *vs.* Pryor, (7 Wheat, 7.) "Where more than one description is given, and there is a discrepancy, that description will be adhered to as to which there is the least likelihood that a mistake could be committed, and that rejected in regard to which mistakes are more apt to be made." (3 Washburn Real Prop., 3d ed., 348–353. "There is no principle of land law more firmly settled in this, and probably most of the States, in respect to country lands than this: That where the calls of a deed, or other instrument, are for natural or well known artificial objects, both courses and distances, when inconsistent with such calls, must give way and be disregarded." (McPherson *vs.* Foster, 4 Wash. Ct. Ct. Reports, 45.)

But if the plat of Lafon did not show it, nor the notice of claim filed by Conway, nor the certificate of survey, still the concluding part of the decision would leave no doubt that its authors recognized the grant as extend-

ing to the water boundary. The argument admits it carries it 351 arpens on the upper and 455 arpens on the lower line. But the decision deals with it as "a patent or complete title." It says: "It appearing to the board from a *patent or complete title exhibited*," etc. The defendants are, therefore, caught in the dilemma of admitting that the board, by its decision (and of course, Congress by its confirmation), has recognized the title as complete and perfect. But we understand the advocates of the limitation maintain there is no proof the plat and survey of Lafon were before the commissioners, and hence, that they cannot be called in to explain or enlarge the decision. The reply is, the law required "a notice in writing, stating the nature and *extent* of the claims, together with a *plat* of the tract or tracts claimed;" and it must be presumed this was done. But on p. 99 of the record the proof is clear that these instruments were before the board when they decided the Conway claim.

If the court will look to pp. 92 and 93, the plat and *proces verbal* of survey in question will be found. They are followed by the petition of Maurice Conway, of 1776, the order of survey by Unzaga of 1776, the survey by Andry of 1776, the patent by Galvez of 1777, and finally the deed from Maurice Conway to Wm. Conway, and from Peter Part to Wm. Conway, and the decision of the commissioners in 1806 on the Conway claim. Now, on p. 99 we find that in 1841 the register of the land office at New Orleans, the lawful custodian of the records of the board, (see act of March 2, 1805, sec. 5, 2d Stats., 324,) certified "that the foregoing plat of survey, and *other* written instruments, *produced as evidence offered in support of said claim*, are true copies taken from one of the records now in my possession and forming part of the archives of this office." These instruments, (also printed on pp. 6 to 12 of Senate Doc. 45), were certified thus by the register on September 16, 1841, and were introduced in evidence in the case of U. S. *vs.* Clark, No. 1814, and U. S. *vs.* Donaldson

& Scott, No. 1815, U. S. Circuit Court, and can there be examined. Since 1841 the land office has been destroyed by fire. (Record, 40.)

Hence, a copy of this copy is competent proof, and is incorporated into No. 588 as evidence. Thus, it is plain, from the certificate of the register in 1841, who then had the entire records of the old board of commissioners before him (since unfortunately destroyed by fire), that the plat and proces verbal of survey by Lafon had been "produced as evidence in support of said claim," viz: that of Wm. Conway. If the court believes this, the theory of a back line, relied on by respondents, fails. Its only support grows out of the assumption that 351 lineal arpens, measured from the Mississippi on one side line, will not quite reach the Amite, and that 455 arpens measured on the other, will not reach the lake Maurepas. But the plat of Lafon shows that the *lines* in question *do* reach those water boundaries, and if by a more careful measurement of them by modern surveyors, with other and more accurate instruments, a difference is developed, it is nothing more than was to be expected, especially when the entire lengths of these lines, one about 14 miles and the other about 25, lie through the densest and most impracticable swamps to be found in Louisiana. The land measures used in the early French and Spanish surveys in Louisiana were of the most primitive kind—usually a raw-hide divided into toises, and which in wet places expanded, and in dry ones contracted. And how do we know with certainty what ratio to assume between the lineal arpen of Lafon and the Gunter's Chain of to-day? In the case of U. S. *vs.* Perot, 8 Otto, 428, the U. S. District Court for Louisiana confirmed the claim for two leagues square, supposing, of course, the grant meant *Freneh* leagues, which would have given an area of 23,040 acres, English measure. But this court reduced this to 17,713 acres, holding that *Spanish* leagues were meant.

The assumption, then, that because, as now measured by United States surveyors, Lafon's 351 and 455 arpens do not reach the Amite and lake Maurepas respectively, Conway's claim therefore extended no further, is not sustained by reason, even if the plat of Lafon, taken as a whole, did not condemn it. But it does condemn it. The upper side line extends from the Mississippi to the Amite in one single course, N. 9°, 15′ E. It does not terminate at a point short of the Amite, and there is no more reason for cutting off a part of this line at the Amite river end than at the Mississippi river end. Lafon may have measured from the Amite to the Mississippi. His *proces verbal* does not say he did not. Had he done so, would we now hear defendant contend that the supposed excess of the true over the alleged distance should be taken from the Mississippi side of the claim? The course, N. 9°, 15 E'., is just the same course as S. 9°, 15′ W.

Had Lafon *in his plat* stopped either line at any of the water-courses they cross near the Amite and lake, then it might be fairly assumed he meant the 351 and 455 arpens as the measures of those lines up to such terminations; but, as he did not terminate them until they reached each one its water boundary, by the same rule and reason we must assume he meant those figures to express the measures of those lines up to those boundaries. The land of Clark, alluded to in the notice of claim the certificate of Lafon and the decision of the board, was the ten arpens of front on the Mississippi previously sold him by Conway, as a part of the 27 arpens of front sold by Maurice Conway, as stated in the notice, on 27th October, 1786. Now, Clark's land in the decision No. 127, (2nd State Papers, 287, Decision No. 127,) is described as "*running back to the river Amite,*" and as bounded *below by Conway.* How, then, could Conway's fall short of that boundary? More than that: the decision No. 133, (2nd State papers, 287, Decision No. 133,) on the claim of Donaldson and Scott, descibes it "*with the depth to the river Amite.*" Now, these

three claims of Conway, Clark, and of Donaldson and Scott are merely subdivisions of the parent grant of 1777. This is undenied. How, then, can the two upper subdivisions extend to the Amite, the water limit of the province when the grant was made, and the lower subdivision, that of Conway, run to a less depth? All the American surveys of Conway carry it to the Amite and Maurepas, and the patent plats of 1844 and 1858, prepared as the basis of patent on the claim, carry it to that limit. (Record, 36.) The decision of the Attorney General of 1847 plainly recognizes Lafon's plat and survey as carrying the claim to the Amite and Maurepas, (4th Opinions, 658,) and the decision of the Commissioner of the General land office of 11th January, 1859, distinctly declares the same thing, and that the confirmation of 1858 followed the claim, the plat, and the survey of Lafon. (Record, 68.)

In conclusion, we point to the requirement that the clerk of the commissioners should send to the Secretary of the Treasury "a transcript of all the decisions made by the commissioners in favor of claimants to land," also, "a full report of all the claims * * * which may have been rejected, &c.," both transcript and report to be laid before Congress for its action, (sec. 5, act 2d, March, 1805, 2d Stats., 324.) The pages in vol. 2, of the State Papers, Public Lands, Green's Ed., described in the act of 1858, viz., from 224 to 367, contain such transcript *and* report, and each is sacred to the character of decisions the law required it to embrace. For instance, the *favorable* decisions on claims of the 1st class and 2d species begin on 257, terminate on p. 287, and embrace the three Houmas claims, Nos. 125, 127 and 133. The *unfavorable* decisions on claims in that class and species then immediately follow. But none of the latter refer to any one of the Houmas claims. Now it is too plain the Conway *claim* extended to the Amite and lake, however far the decision may extend. But if the commissioners intended the latter to deny any land embraced in the former, then they left that intention to

rest on implication. For it is clear they did not, as in other rejected claims, express it in a reported decision. If this could be made plainer it would only be necessary to observe their practice in the few claims they partially confirmed and partially rejected. This is what our opponents contend they did with Conway claim; confirmed it in part, rejected it in part. On p. 288, under the head of rejected claims, the commissioners, under the Nos. 119, and 152, reject in part the claims of James Villery and and Anthony Bienvenue, respectively, and expressly refer to the *favorable* decisions under which they had confirmed them for other parts of the same claims. As nothing of the sort was done about the Conway claim, it is clear the board did not intend any denial or limitation.

III. *Was the claim forfeited and reannexed to the domain by reason of non-suit under the act 17th June*, 1844? (5 Stats., 67.)

This act revived portions of the Missouri act of 26th May, 1824, (4 Stats., 52,) and extended them to Louisiana for the period of five years. Among those so revived sections 5 and 7 are pertinent to this enquiry.

"Sec. 5. *And be it further enacted*, That any claim to lands, tenements, or hereditaments, *within the purview* of this act, which shall not be brought by petition before the said courts, within two years from the passing of this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law and (in) equity, and no other action, at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever in relation to said claims."

"Sec. 7. *And be it further enacted*, That in each and every case in which any claim tried under the provisions of this act shall be finally decided against the claimant, and in each and every case in which any claim *cognizable under the*

terms of this act shall be barred by virtue of any of the provisions contained therein, the land specified in such claim shall forthwith be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land in the same district." (Italics our own.)

It is contended that as the Conway claim was not put in suit under the act of 1844, by the force of the above provisions it became a part of the public domain, and, being nearly all swamp, passed to the State by the swamp land grant of 1849.

The argument on this point overlooks both the admitted nature of the grant of 1777 and the fact that at the date of the act of 1844 the claim was then *sub judice*, and had been since 1806, and so remained until 1858.

The act of 1824 has uniformly been held to extend only to imperfect, inchoate titles as to which the United States, the successor of Spain and France, were called upon to do that which it was reasonable to believe the parent government would have done had it retained the province. Certainly, the language of the first section, "and which might have been perfected into a complete title under and in conformity to the laws, usages, and customs of the government under which the same originated," etc., can sustain no other interpretation. See U. S. vs. Constant, 12 How., 437, and especially the language of the court on pp. 441 and 442.

On page 439 and again on page 441 the court quote from the operative clauses of the perfect grant then before them, and it will be seen the language making, in their opinion, the *titulo in forma*, is nearly identical with the granting clauses in our grant of 1777. (Record, 43.)

The following additional cases show the uniform construction placed upon the act of 1824. (U. S. vs. Dauterieve, 15 How., 14; U. S. vs. Reynes, 9 How., 127; U. S. vs. Pellerin, (13 How., 9.) The argument implies a censure upon the Congress their legislation does not warrant.

Conway had already, in response to the act of 1805, filed his title and deeds before the special tribunal provided by that act; had obtained its decision in favor of all he claimed, and that decision bound the Government at least until reversed by Congress, for Congress was the only authority provided by law for its review. So far from supposing, in 1844, that the act required them to again present their title to the Government, the then owners of the land under Conway must have thought, as they had a right to think, that the silence of Congress upon the decision of 1806, communicated to them in 1812, was an acquiescence, certainly not a deceptive silence. Rights had grown up under the faith of that decision, and under the just confidence felt by all men that it would never be disturbed. A. F. Rightor, in 1836, had sold ninety thousand arpens of the back lands in the Conway division at $2.50 per arpen to Slidell, Kohn, Zimpel, and others. These are the lands the State has lately sold for 12½ cents and 25 cents per acre. (Record, 119–122.) Many other sales had taken place at large prices, and the whole front of the Conway tract had been formed into three large sugar estates of great value, and were then, as now, in a high state of cultivation.

But it is said though the grant of 1777 was perfect as to two arpens, or forty arpens, or eighty arpens in depth, and to such extent was not within the act of 1824, yet, for the residue of the depth, it was not perfect, and for such portion it was within the act. And being so, and not having been sued on under the act, it became forfeited to the United States, and on the morning of the 17th June, 1846 or 1849, the United States owned that much more land there than they did the day before.

But the argument has no force in it. It is founded in the assumption that the grant of 1777 was good in part and bad in part; that as a title it could be split, and one part held complete, the other incomplete. This savors of refinement. We have seen all the officers of the Government have held it a complete, valid title, protected as such

by the treaty for all it could be held to cover. There never had been a point in controversy about the title except its depth, and that was closed forever by the act of 1858. The argument now is that it is valid for a part of the land, and for the residue it is and has been inchoate and incomplete. This is as novel as the effort to limit the grant in the rear by an imaginary right line. If these defences have no other merit, they have at least this, that no one ever thought of them before.

Had the title of Conway been founded in an order of survey or other inchoate right the policy and objects of the legislation of 1844, relied upon now to forfeit it, could by no just process of reasoning be held to extend to or embrace it, since it was then before Congress under prior legislation awaiting final action on a favorable decision of a special tribunal pronounced in 1806 and by law made subject to no other authority. But he relied on a *perfect Spanish patent* ante-dating the existence of the United States as a nation and protected by the treaty of 1803. U. S. vs. Wiggins, (14 Peters, 344;) Fremont vs. U. S., (17 How., 542;) Maguire vs. Tyler, (8 Wall., 650;) Henderson vs. Poindexter, (12 Wheat., 530.) In the Fremont case the court draw special attention to the fact that under the California act of March 3d, 1851, (9 Stats., 631,) all titles, perfect and inchoate, were required to be prosecuted under its terms, while under the legislation applicable to Missouri and Louisiana inchoate titles were only cognizable by the courts. The argument imputes to the acts of 1824 and 1844 dissimulation and art. The former predicated the forfeiture relied on here of "lands, tenements, or hereditaments within the *purview* of" the act not sued on or ineffectually sued on. The first section defining the claims that were within the purview clearly excluded those held under complete grants; for as to them how could it be said they "might have been perfected into a complete title" under the government originating them?

As we have said, Conway's title had, in obedience to the

act of 1805, been presented, with ample proof to sustain it, to the special tribunal appointed by Congress under a law declaring they should decide it "in a summary way, according to justice and equity," and that such decision should be subject only to final rejection by that body. He obtained the unqualified decision of this tribunal, and he knew that it was laid before that body in 1812. More than that; he knew that section 6 of the act of March 3d, 1811, (2 Stats., 662,) had declared "that till after the final decision of Congress thereon no tract of land shall be offered for sale the claim to which has been in due time and according to law presented to the register of the land office and filed in his office for the purpose of being investigated by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the Territory of Orleans." Having done these things, could he suppose thereafter a statute expressly applicable to inchoate grants intended he should again and before a different department of the Government present his right and supporting evidence? If the case could be made stronger, it is only needful to remember that within less than three months after the act of 1844, the President, John Tyler, had granted (record, 84, 85) patents for two of the Houmas claims upon the assumption all of them had been confirmed by the act of 18th April, 1814, (3 Stats., 139.) How could Conway or those holding under him suppose it necessary to bring suit against a government which had done and was doing these things? He even knew, or the three owners of the land knew, that on March 3d, 1845, the President had also personally directed the Commissioner of the General land office to issue the patent on the Conway claim. (4th Opinions Atty. Gen., 678, 679.)

The very ground, perhaps the only one, on which the circuit court for Louisiana in the equity suits to annul the patents of 1844, founded its decree, (Justice John A. Campbell, presiding,) was that the three subdivisions of the grant of 1777 were founded on a complete and not an in-

choate title, and that the act of April 18th, 1814, (3 Stats., 137,) on which alone the validity of the patents rested, confirmed only the latter, and not the former classes of grants. (Record, 68, 104, 138.)

What more is needed to show that the Conway claim was not within even the letter of the laws of 1824 and 1844? That it was not within the spirit of those laws is plain, too, even if within the letter, because their only object was to bring such pretensions to the notice of the Government, with a view to their speedy adjustment.

The act of 1844 was not designed to ensnare men as a Russian ukase or Turkish firman. So far as it inflicts a penalty or operates a forfeiture it will be strictly construed. But even if the claim was annexed to the domain under the act of 1844, certainly no act of the Government, or any officer of it, was taken to enforce it, and the confirmation of 1858 may well be, in equity, deemed a waiver of such forfeiture.

IV. *Did the swamp land grants of* 1849 *and* 1850, *or either of them, embrace the claim?*

These grants have uniformly been construed to be grants *in praesenti*, as their terms import, and unless they attached to the supposed forfeited lands when passed, they did not afterwards. Railroad Co. vs. Smith, (9 Wall., 95;) Same vs. Fremont County, do., 89; French vs. Fyan, (3 Otto, 170;) Opinion Secretary of Interior of 28th Sept., 1859, 1 Lester's Land Laws, 456, No. 506; Opinion of same of 21st June, 1856, do. 555, No. 585.

If we consider the humane policy of the act of 1805, inviting, for it did not compel, owners of lands under complete grants to register their claims and exhibit their evidence of right, and the second proviso to the 6th section of the act of March 3d, 1811, (2 Stats., 662), protecting from sale claims so filed, "till after the final decision of Congress thereon," and remember that Conway's claim

had been recognized by a special tribunal as a perfect Spanish patent, covering all it was claimed to cover, it will require the strongest language Congress could employ to support the monstrous idea that that body intended to make a gratuitous donation of his lands to the State for any purpose whatsoever. In 1849 Congress had before it every important fact on which the claim rested, and, moreover, the favorable decision of the old board, rendered in 1806, before them. Nay, the very suits in equity were then pending in the Federal courts ordered by the President, to vacate the patents of 1844. In the face of all this, to contend that that body intended to grant away the lands to a third party, as a mere donation, is a reckless assertion which finds no support in the language of the supposed donation, in the situation of the parties, or in the objects of the grant.

Who can believe Congress intended to take the lands of Conway and give them to Louisiana? Robbing Peter to pay Paul is bad enough, but robbing Peter to give to Paul is intolerable. The grant of 1849 manifests no such purpose. This court, any court, would require the clearest words of grant before construing the act of 1849 as expressive of any such injustice on the part of Congress. Its terms expressly except lands "*held or claimed by individuals.*" No one can doubt these words have a necessary reference to all such equitable claims and inchoate rights whereof the legal title was in the Government, and which but for such reservation would be held to have passed under the granting clause. Legal titles, perfect rights, as they would in the judicial tribunals, at all times and under all circumstances, have been maintained against the adversary grant to the State, needed no protection by the statute. But rights, claims, and pretensions, resting only in natural justice or founded in considerations of policy, as these could have no *standum in judicio* when assailed by the State or her grantees, it was but just they should be protected. And they were. The act of 1849 must be read as

a whole. To effectuate the grant, selections of the lands described as swamp and overflowed, and thereby rendered unfit for cultivation, were to be made by the Federal surveyors, and the lists containing them submitted to the Secretary of the Treasury (now Interior). On his approval of such lists, the fee simple title was to "vest in the said State of Louisiana, subject to the disposal of the legislature thereof." But the statute expressly declares that he shall only approve the lists "*so far as they are not claimed or held by individuals.*" See the construction these words have sustained by the Government and the courts. Opinion of Secretary of Interior of September 28th, 1859; (1 Lester's Land Laws, 456, No. 506;) opinion of same of 21st June, 1856, p. 555, No. 585, (the private claim of De Villemont, referred to in this last opinion, was decided void by the Supreme Court, December term, 1851, 13 How., 261;) opinion of same of January 14th, 1856, p. 554, No. 583; opinion of same of 22d July, 1859, p. 570, No. 601; R. R. Co. vs. Fremont Co., (9 Wall., 92.)

These lists are always preceded by the saving clause of the statute, and the formal approvals by the secretary are made with like reservation (record, 59 and 124).

Such lists had so accumulated in the general land office in consequence chiefly of protests and oppositions of those whose adverse claims and holdings were protected by the words, "claimed or held by individuals," that Congress had to interfere. See explanation of this embarrassment stated in R. R. Co. vs. Fremont Co., (9 Wall., pp. 91 and 92). The act of March 3d, 1857, (11 Stats., 251), was the result, and nothing could more clearly reveal the sense in which Congress regarded the grants of 1849 and 1850. These acts had made the Secretaries of the Treasury and Interior the authority to investigate particular cases as they arose, and to approve the selections. But the mass of contests and adversary claims accumulated so that, in effect, the two acts were suspended. Then Congress interposed. But, in thus dealing generally by one brief statute, with so

nice and intricate a subject, we find they used the most comprehensive words to guard all manner of adverse rights, claims and pretensions. They confirm the lists only "*so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States.*"

If the court needs light on this plain statute, it will be found as follows: Opinion Secretary Interior, January 8, 1858; 1 Lester's Land Laws, 558, No. 589; same, p. 565, No. 596; same, p. 570, No. 602; and see the interesting decision, on this act, of the supreme court of Louisiana in Marks vs. Martin (27 An., 527), affirmed by the Supreme Court of the United States (7 Otto., 345). The selections of swamp lands in the Conway claim were not made until 1879, though two townships in that claim had been surveyed in or about 1830, under Mr. Graham's instructions of 1829. No one supposed the State had any title to these lands. It was an afterthought put in operation 32 years after the alleged grant, by those who knew too well how to manufacture land titles on occasion. Suppose the selections had been made at an early date, and had been pending when the act of March 3d, 1857, was passed. Surely no one will contend it would have confirmed to the State the title to such lands. Whether or not the grant of 1777, as it then stood, (at least recognized by the only tribunal that could take cognizance of it,) amounted to an indefeasible title against the United States, it certainly had the dignity of a claim or equitable demand, which it was unconscionable to grant away as a mere donation to a third party.

But we are told the words "claimed or held by individuals," in the act of 1849, mean lawfully claimed or held by individuals. This would impute to Congress the intent to protect rights needing no such protection, and to leave unprotected the very class of claims and equities which, but for some saving clause, would have been sacrificed.

The California act of March 3, 1853, (10 Stats., 246,) sixth section, in extending the pre-emption system to that State, made several reservations, and among them, "lands *claimed* under any foreign grant or title." In Newhall vs. Sanger (2 Otto., 765), it was held by defendants, as here, that this meant *legally* claimed. The court said, p. 765: "This section expressly excludes from pre-emption and sale, all lands claimed under any foreign grant or title. It is said that this means *lawfully* claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication." This is the case we chiefly rely on to show that the claim of Conway, being *sub judice* in 1849, was not within the intent of the swamp grant; and we ask especial attention to it. It was upon its authority the Commissioner of the General land office, on 24th of November, 1879, held the State had no right to swamp lands within Wm. Conway (record, 62).

On the 3d of May, 1881, the Secretary of the Interior reversed him, (record, 62), (Copp's Land Owner, vol. 8, No. 2, p. 21), and held that, under the authority of Ham vs. Mo. (18 How., 126), the State was entitled. Accordingly, on June 10, 1881, he approved two lists of selections in favor of the State, for about 12,000 acres of land (record, 59). Both officers first eliminate from the subject the grant of 1777, (because Mr. Schurz had, in 1878, confined it to a depth of two arpents,) and the confirmation of 1858, (because it had been revoked,) and then, having cleared the ground of the last vestige of right on the part of the grant claimants, each one dealt with the lands as, in his opinion, clearly public. The commissioner thinks as such the State cannot claim them; because at the date of her alleged grant, 1849, the lands were in a state of reservation, as expressly declared in section 6, of the act of March 3, 1811, (2 Stats., 664). But the Secretary, while admitting this, holds such reservation could not prevent the plenary

power of Congress from making an express donation. The commissioner clearly has the best of the argument, for the facts of the Missouri case, the only authority cited by the Secretary, are all different from the Houmas grant, whereas, the facts in the California case, cited by the commissioner, are just the same.

In the Missouri case, the claim opposed to the State had absolutely nothing of a foreign nature to support it, (18 How., p. 128.) Certain parties petitioned the lieutenant governor of upper Louisiana for a grant of land, who, doubting his authority to give it, referred the petition to the intendant general at New Orleans. He directed the documents to be translated into a language he understood. There the foreign proceedings stopped. In 1801 the parties got a surveyor to survey the land, and afterwards filed their claim before the commissioners for Missouri, sitting under the same statutes of 1805, 1806 and 1807, under which the old board in Louisiana sat. On 27th December, 1811, they unqualifiedly rejected the claim; (see 18 How., p. 132, and 2 State Papers, Green's Ed., p. 556.) Of course that decision was subject to the final action of Congress. (Sec. 5, act of March 3, 1805.) But before it was rendered Congress had, by sec. 10 of the act of March 3, 1811, (2 Stats., 662), *reserved* the part of the claim which future Federal surveys should show to be within the lines of the 16th section, and had *appropriated* it for the use of schools. In the *same* section of the *same* act, then follows the proviso, relied on by Ham to protect the claim from the *grant* to Missouri in 1820. The first part of the section had *reserved* the land; the act of 1820 *granted* it. Of course, as held by the court (p. 132,) the proviso had no connection with lands reserved by the preceding language. The grant was made by the 6th section of the Act of 6th March, 1820 (3 Stats., 547,) and clearly it conveyed the 16th section included in the claim, unless it had been previously reserved or appropriated for the purpose of satisfying the private claim, (pp. 130 and 131.) The private claim was

finally confirmed by act of 24th May, 1828, (6 Stats., 386,) but with the proviso that the confirmation "shall extend only to a relinquishment of title on the part of the United States, nor prejudice the rights of third persons, nor any title heretofore derived from the United States by purchase or donation." How this case can be distorted into an authority, sustaining the alleged grant by the act of 1849 to Louisiana of the swamp lands in the Conway claim, it is difficult to see. Evidently, the Secretary has no great confidence in his own decision, for, though rendered over two years ago, he has only approved under it a small portion of our lands, and refrains from proceeding further, at the request of the writer of this brief, who has assured him the whole question was before the courts, where it properly belongs. We admit if the grant of 1777 had been an incomplete title under Spain it would have been so under the United States until the confirmation of 1858, and that hence Congress would have possessed the *power* to have granted the fee simple title to Louisiana, notwithstanding its pledges to protect the claim, as implied in the act of 1805, and expressed in that of 1811. What we deny is, that Congress *intended* to do this by the act of 1849; and its reservations and the authorities show this.

The grant of 1849, like all public grants, must be, and has been, construed strictly:—

Opinion Secretary Interior, of December 2d, 1874; Copp's Pub. Land Laws, p. 478; Rice vs. R. R. Co., 1 Black, 380; Attorney General Black's Opinion, of 22d November, 1858, (9 Opinions,) reported also in Lester's Land Laws, Regulations, etc., 503.

The whole subject of public grants was reviewed by this court in Leavenworth R. R. Co. vs. U. S., (2 Otto, 733,) and on pp. 746 and 747, it is settled that, under the law and facts in our case, the grant of 1849 cannot be held to embrace the Conway claim.

All the officers of the land department have united in opinion that sec. 6 of the act of March 3, 1811, (2 Stats.,

662,) reserved our lands from any hostile disposition by them. The last of these decisions was made as late as 1878, (record 106, and see 88 and 127.) Is it reasonable to believe a policy inhibiting sales for a price would tolerate gratuitous donations?

V. *Were these suits within the jurisdiction of the Circuit Court, and can the relief prayed and judgment asked be granted by the judicial department?*

As to the bills against Grandjean, No. 587, and Richardson, No. 588:

The question is answered by Osborn vs. The Bank, 9 Wheat., 856, followed by the recent cases of Davis vs. Gray, 16 Wal., 203; Hancock vs. Walsh, 3 Woods, 256; and Lottery Co. vs. Fitzpatrick, do., 256, and Board of Liquidation vs. McComb, (2 Otto, 541.) In all of these injunctions were sustained against the State officers, though in all immunity was claimed, as here, on account of the sovereignty of the respective States under whose laws the wrongs complained of were perpetrated.

A later case still is U. S. vs. Lee, 106 U. S., 196. The principle runs through them all, strongly in the Osborn case, that if the alleged authority is void, the officer exercising it is not beyond the injunctive remedy. In that case the State auditor and treasurer and their assistants were enjoined perpetually from collecting a ruinous tax from the bank under a law of Ohio directing it to be done, and upon the sole ground that the law was unconstitutional. In Davis vs. Gray the governor of Texas and the commissioner of the land office for that State were enjoined from enforcing a like unconstitutional law and *unconstitutional* constitutional provision of Texas, whose object was the confiscation of the property of a railroad company alleged to be in default.

Thus it will be seen there is nothing in the mere fact respondents were State and Federal officers which can protect them. That depends upon other facts and other considerations.

If they seek to take advantage of an unconstitutional law or laws of the State of Louisiana, or of the United States, or are acting outside of constitutional laws, and doing acts injurious to private property, for which, when done, no adequate relief can be had at law, then they cannot claim exemption as officers from the process of equity which would reach a private citizen under like facts and circumstances. It would be strange, indeed, if under the panoply of State and Federal sovereignty, prolific of abuses and irremediable wrongs, their officers should be so irresponsible in official dealings with their fellow-men that the equity courts of the Union may not restrain them when committing unauthorized and grievious wrongs on private rights.

We neither ask nor seek any judgment nor other relief against the State, or the United States, nor against one of their departments of government. Their own laws do not authorize the wrongs set forth in the bills of complaint and admitted in the answer in suit, 588, and the demurrer in No. 587.

All the suits are within the jurisdiction of the Circuit Court under section 1 of the act of March 3d, 1875, (18th Stats., Part 3, p. 470,) extending it to "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority," &c. The following cases involve the construction of this act: Railroad Co. vs. Mississippi, (12th Otto, 135;) removal cases, (10 Otto, 457;) Pacific R. R. Co. vs. Ketchum, (11 Otto, 298;) Whitsit vs. R. R. Co., (13 Otto, 770.) The pleadings, admissions, &c., afford no doubt the suits arise under the treaty of 1803 and the laws of the United States. They are those in which "the jurisdiction is entirely founded on the character of the case," and "in which the parties are not contemplated by the Constitution." Cohens vs. Virginia, (6

Wheat, 264.) The jurisdiction does not depend on citizenship.

The 3d article of the Constitution and the 11th section of the Judiciary act, would probably oust the jurisdiction if that depended upon citizenship, (1 Abbott's U. S. Courts Practice, 212.)

What was said in Cohens vs. Virginia as to jurisdiction in that case may, in view of the late act of 3d March, 1875, be said of the circuit court's jurisdiction in these: "In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is every thing, the nature of the case nothing. In the other description of cases the jurisdiction is entirely founded on the character of the case and the parties are not contemplated by the constitution. In these the nature of the case is everything, the charater of the parties nothing." The act of 1875 marked an epoch in the theretofore slow process of enlarging the jurisdiction of the Federal courts. It has undergone a thorough discussion in Railroad Co. vs. Mississippi, 12th Otto, 135, and its meaning settled as to the point now under consideration. It is true the "case" there arose under the 2d section, providing for removals from the State courts, whereas these arise under the first.

But as the jurisdictional language is identical in both the language of the court settling the meaning in one settles it in the other.

The case turned upon the question whether or not the railroad company, defendant in an inferior State court, could claim the right of removal under the second section. The State resisted the motion successfully in that court, the cause proceeded to judgment there, and on writ of error sued out by the company the supreme court of the State sustained the judgment of the court below on the merits, and also on the motion for removal. The company then brought error to this court, and if it had the right to liti-

gate its *defence* in the Federal courts it was only because that defence rested on Federal Constitution, treaties or laws. The court was satisfied it did, and on that ground alone sustained the construction put by the company on the second section. It said (p. 141:)

"That a case in law or equity consists of the right of one party, as well as of the other, and may, properly, be said to arise under the Constituion or law of the United States whenever its correct decision depends on the construction of either."

"That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part by whom they are asserted.

"That except in the cases of which this court is given by the Constitution original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and lastly,"

"That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the circuit court jurisdiction of that cause, although other questions of fact or law may be involved in it."

The bills against the State register and the United States surveyor exhibit a title at law to certain lands, of large extent and value, parts of which have been held in peaceable, undisturbed possession time out of mind, cultivated as valuable estates, on which improvements of immense value have been constructed, and on which taxes have been paid for a century; and then show that defendants without right or pretense of right in the lands, but claiming to act

under authority of certain officers of the land department of the United States, are committing and will persist in so doing continuous trespasses which must directly tend to the destruction of the estate or to an injury totally irreparable at law unless restrained by the process prayed for. That this presents a proper case for the interference of a court of equity is clear; that it presents a remarkable case, relievable only in equity by injunction, is little less so. (Adams' Equity, 209, 210, and notes; 2 Daniel's Ch. Practice, 1631, 1632, and notes; Hilliard on Injunctions, Chap. 10, Sec. 1; Same, Chap. 28, Sec. 1 b; Parker vs. Winnepiseogee Lake, etc., 2 Black., 551–52; Ellis vs. Earl Gray, 6 Simmons, 214; Green vs. Mumford, 5 Rhode Island, 472.)

In each of the four cases it is plain the theory of the defence is the validity of the law repealing the grant of 1858. If that law is void, it is plain the officers of the land department should be enjoined from a confiscation justified only by its terms, and no less plain the State officers should be likewise restrained in their sales and creation of clouds on title only justified by the same law.

In the circuit court the suit against the Government surveyor was resisted on the authority of U. S. vs. McLemore, (4 How., 286,) and Carr vs. U. S., (98 U. S., 433;) but the court was satisfied they did not apply. The first was a bill to enjoin execution on a money judgment obtained in a suit brought by the United States against certain persons whom the plaintiffs in the injunction suit represented. They alleged and showed the judgment had been satisfied prior to the issue of execution, and they were clearly entitled to the relief if an individual had been respondent. It was really and nominally a suit against the United States, and no other parties were named defendants. The judgment of the circuit court was *against the United States* as defendants, and decreed perpetual injunction against them, and that *they pay costs!* (See p. 288.) Of course this court reversed this, upon the ground that the Government could not be sued without its own consent.

The other case is as far from the mark. Two lots of ground in San Francisco had been recovered in a State court, in separate ejectments brought by separate plaintiffs against certain officers of the United States in possession, as such, of a Government hospital built thereon by the United States, in which suits the United States District Attorney, and special counsel employed and paid by the Secretary of the Treasury, defended. Carr subsequently acquiring title, was made defendant in an action by the United States, in the circuit court for California, to quiet title, and pleaded the above judgments in ejectment as his title, among other things of no importance here. This court, on appeal by Carr, said the judgments did not estop the United States because rendered in suits instituted against their officers in actual possession as their agents, without the consent of the Government; see p. 438, and cases referred to. What parallelism is there between that case and the suit to enjoin Mr. Grandjean? The ejectment suits were brought to test rival claims to certain property in the actual occupancy of the Government officers, defendants in the cases.

But the later case of U. S. vs. Lee (106 U. S., 196), seems to overrule this case.

It was argued below in the cases at bar, that the United States were in possession; but in none of the cases was this shown.

How can it be said the United States are in possession of our lands? They can only possess, as was said by the court in the above case, by their officers, and yet the United States has not an officer in that whole region, unless it may be one of their surveyors, encamped here one day and there another, and nowhere long. Do they possess 123,000 acres of land through Mr. Grandjean, whose tent covered ten by twelve feet, and who left the claim and went home long ago? The plaintiffs are in possession of all the land susceptible of being cultivated, and under a claim of title extending to every part. And they and their authors have

been so for a length of time antedating the existence of the United States and the war of the American Revolution. Possessing and cultivating the front lands, and using those in the rear by cutting timber, making drainage canals, and grazing cattle, etc., upon them, the only use to which they are adapted,—under a title embracing the whole, is possession of the whole—Civil Code of Louisiana, 3437, (old art., 3400); 2 Hen. Dig., new edition, p. 1205, C. 15, 8, 12; p. 1207, No. 35.

It is not denied the courts will not by injunction or mandamus interfere with officers of the executive branch of the Government while discharging duties involving judgment and discretion devolved upon them by law. Gaines vs. Thompson, (7 Wall, 347); Litchfield vs. Register, (9 Wall., 575); Lindsay vs. Haws, (2 Black, 557); U. S. vs. Schurz, (102 U. S., 378); Kendall vs. Stokes, (3 How., 98). As it is said, the courts will not substitute their discretion for that given the officer by law, Johnson vs. Towsley (13 Wall., 87). But the facts in the cases at bar show a total absence of power in the Secretary of the Interior, the commissioner of the land office and the surveyor general, to exercise either distretionary or ministerial functions in and about the lands in question. These officers, by their own admissions, are acting beyond the law, if the law of 1858 granted the lands and the law of 1860 is void. The principle running through the last cited cases finds no application here. The history of the Houmas controversy, as shown by the record in No. 588, is one of constant effort by the land department to secure an adjustment of it by the courts. No issues of fact have been raised, and none are raised in these suits. All is law. The act of 1860 was *brutum fulmen*, and no one thought of enforcing it. It remained for Mr. Schurz, eighteen years after its enactment, to raise the first official voice in support of the great wrong, and to make some feeble attempt to enforce it. He was no lawyer, or he would have obeyed the Constitution and ignored a statute in admitted conflict therewith.

In Little et al. vs. Barreme et al., 2 Cranch, 179, a commander of an armed United States ship had seized and libelled a Danish vessel on the high seas for violation of the non-intercourse act of 9th February, 1799, (4 Stats., 244,) whose 5th section authorized the seizure of American ships sailing *to* a French port. The instructions of the President, going beyond the law, authorized the seizure of such vessels going *to* or *from* a French port. The case turned on the effect of such an order in justifying a seizure clearly illegal without it. Chief Justice Marshall, delivering the unanimous opinion of the Court, said: (P. 179.) "I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions cannot change the nature of the transaction or legalize an act which without those instructions would have been a plain trespass. * * * * Captain Little then must be answerable in damages to the owner of this neutral vessel," &c. The judgment of the circuit court had awarded damages in the sum of $8,504, and this was affirmed with costs.

In Mitchell vs. Harmony, 13 How., 137, a Lieutenant Colonel under Colonel Doniphan, in command of that part of the Army invading the northern states of Mexico in 1846, under necessity of war as pleaded in defence, forcibly constrained a trader to remain with the expedition while invading Chihuahua, with his mules, wagons, and goods, by reason of which the whole were captured by the enemy and totally lost.

After the war in trespass in the Circuit Court for the Southern District of New York a judgment for $95,855.38 was rendered against the officer, Col. Mitchell, and on er-

ror this Court affirmed it. The seizure was justified on several grounds, the 5th being: (P. 132.) "That the defendant acted in obedience to the order of his commanding officer, and therefore is not liable." Chief Justice Taney said, delivering the opinion of this Court: "The 5th point may be disposed of in a few words. If the power exercised by Col. Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power or acted from improper motives. But we have already said the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right, and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act, to commit a trespass upon the property of another, and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, but it cannot justify."

The case of Captain Gambier, thus referred to, is stated by the Court on p. 135: "Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed. This case shows how carefully the rights of private property are guarded by the laws of England, and they are certainly

not less valued nor less securely guarded under the Constitution and laws of the United States."

In Avery vs. Fox, (1 Abbott's U. S. Rept., 246,) an act of Congress had appropriated money and authorized the Secretary of War to divert a navigable stream entering into lake Michigan, in order to improve navigation and afford a safer harbor. Against the agents and contractors employed by the Secretary an injunction was prayed on the ground of irreparable injury to the milling and other riparian rights of plaintiffs. While the writ was denied for insufficiency of facts, the law of the case, as laid down on p. 254, clearly showed the court did not regard the character of the defendants as agents of and contractors with the United States as affecting the matter. "The War Department is not acting as the executive power, but ministerially. If the court has jurisdiction of the subject-matter or person of the defendants I know of no rule which would exclude from the process of injunction any person on account of the character or capacity in which he acts, although such character or duty be conferred or imposed upon him by the laws of the State or of Congress." That case does not seem to have come here.

In Bonaparte vs. the Camden & Amboy R. R. Co., 1 Baldwin, C. C. Reps., 206, an injunction was granted to restrain the company from constructing its works to the injury of private property where no compensation had been paid, and where proceedings at law would not give adequate relief. See the authorities cited by the court, p —, 218. This case did not come here.

In High on Injunctions, vol. 2, § 1308 *et seq.*, no distinction is countenanced between the power or duty to issue the writ against public officers of the States or the United States, and the power and duty to issue it against other persons under like facts and law. The determining question in the case of officers is, "whether they are acting within the scope of their authority, or whether they are transcending that authority." This principle was the controlling

one on which this Court sustained the injunction against the State officers in Board of Liquidation vs. McComb, 2 Otto, 541.

In conclusion, we therefore ask:

That in Nos. 587, and 588, and 916 the decrees of the circuit court be reversed, and that this court now render decrees recognizing the grant made by the act of 1858, declaring the repeal of 1860 void, and perpetually enjoining defendants, as prayed in the bills of complaint.

That in No. 917 the judgment of the circuit court setting aside the order of sequestration, quashing the writ, and dismissing the petition, be reversed, and that a judgment be here given in favor of petitioners and against defendant, as prayed in said petition.

Respectfully submitted.

JAMES L. BRADFORD,
Solicitor and Attorney for Plaintiffs in all the cases.

WASHINGTON, D. C., *December* 22, 1883.

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Supreme Court U. S.
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CLERK

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

No. 588.

ALFRED SLIDELL ET ALS., APPELLANTS,

versus

JAMES H. RICHARDSON, REGISTER, ETC., APPELLEE.

Brief of Appllee.

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellee.

E. P. Hansell, Stationer and Printer, 39 Camp Street, New Orleans.

Supreme Court of the United States.

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STATEMENT.

While the territory of Louisiana was still under the dominion of Spain, one Maurice Conway made application, on the 9th of September, 1776, to the governor for a grant of land. His petition was allowed on the 27th of the same month. Lewis Andry was ordered to survey the land and put the applicant in possession.

Accordingly, a tract of land, ninety-six arpents front on the Mississippi river by a depth of forty-two arpents, was surveyed. This was the grant actually made; but it is averred by plaintiffs that, though the side lines were run only forty-two ar-

pents into the interior, *it was intended* that they should be extended back to Bayou Manchac and Lake Maurepas, in the same general direction, *whenever* it might suit the *convenience and interest* of Maurice Conway to do so; but it is *not* averred that Conway ever found it convenient, or to his interest, to have them extended, or that they ever were actually extended.

The intention that these side lines should be so extended is to be inferred, as plaintiffs aver, from the fact that the jurisdiction of the Spanish governor was bounded by the said lake and river.

After the cession of the territory of Louisiana to the United States in 1803, Claiborne, then military governor of Louisiana, gave a license to one Lafon to fix the limits of this grant. By his survey, made February 20th, 1806, the lower part of the land was set off to William Conway, with a front on the Mississippi river of twenty-seven arpents, the upper side lines being run 351 arpents, and the lower side line 455 arpents back to the Bayou Manchac and Lake Maurepas respectively.

William Conway then went before the commissioners appointed to adjust the land claims in Louisiana under the act of 2d March, 1805. He claimed only *twenty-two* arpents front by a depth of 351 arpents on the upper and 455 on the lower side. His claim was reported favorably to this extent.

The favorable report of the commissioners, it is

averred, was *probably* confirmed by the act of congress, approved April 18th, 1814. But this act has no application to the Houmas grant. See 3 Statute, page 137.

The two acts of April 12th, 1814 (page 121), and of April 29th, 1816 (page 328 of the 3 statute), did act on the report; but they confirmed only such claims as contained one square league (5860 acres) of land and less, excluding from confirmation all claims for a greater quantity, and especially the claim of William Conway for 123,000 acres.

In 1829 James P. Turner, surveyor-general of Louisiana, surveyed the Houmas grant, and he fixed the side lines at *forty-two arpents in depth*, and declared all between this limit and Amite river to be public lands.

"And plaintiffs declare that from that time to the "present the United States have maintained, and "from time to time asserted, by sale and grants to "the State of Louisiana, and other hostile preten-"sions, their rights as proprietors to all the land in-"cluded in the Houmas grant lying back of said "forty-two arpents."

They say that they *believe* the surveyor-general made a patent plat of the Wm. Conway tract in 1836, recognizing the grant as extending to Bayou Manchac and Lake Maurepas; that in 1842 the commissioners of the land office had instructed the surveyor-general *not* to make a survey of this tract,

and that the secretary of the treasury declared, in 1842, that the executive department of the government had always refused to recognize the validity of the claim beyond forty-two arpents in depth; that in 1844 a survey plat was made recognizing the grant to the extent now claimed, but that no patent was issned upon it to William Conway.

That in 1846 Nathan Clifford, attorney-general, gave an opi nion that *all* the patent plats and patent certificates, and other evidence of title, were utterly null and void, and advising that the grant to Maurice Conway was valid and complete to the extent of forty-two arpents in depth only.

Accordingly, congress directed, by act of June 26, 1846, that suit be brought to annul the patents issued to Daniel Clark and Donaldson & Scott for their part of the grant. A decree has been rendered in the suit against Clark in the circuit court annulling his patent.

The next step taken by the claimants was to obtain a clause in he "Omnibus Bill" of June 2, 1858, purporting to confirm this grant, but on the 3d of March, 1859, a joint resolution was passed suspending the issuance of a patent; and finally, on the 21st of June, 1860, an act was passed repealing the act of 1858, and refusing to confirm any part of the Houmas grant.

This is a fair statement of the history of the Houmas grant as disclosed by the bill filed by com-

plainants. The purpose of the bill is to restrain the register of the State land office from selling or disposing of any part of the land included in the alleged grant.

The defendant has answered, demurring to the jurisdiction of the court to give the equitable relief prayed, and denying complainants' title beyond 42 arpents in depth, and averring title in the State of Louisiana to so much of the land as is subject to overflow, and rendered [redacted] unfit for cultivation, through the grant to the State, contained in the acts of 1849 and 1850.

It is not clear from the bill whether complainants claim title through the grant to Conway, as a complete grant from Spain, or through the act of congress of 1858. In argument at the bar their counsel claim perfect title from both sources.

ARGUMENT.

We propose to submit the following propositions for consideration in the order stated:

1. That the State of Louisiana is the real party in interest, and that this court has no jurisdiction to determine her title to these lands by suit against the register of the land office.

2. That a person out of possession cannot maintain a bill in equity to quiet title, or to remove or prevent a cloud upon his alleged title, nor against a single defendant to prevent a multiplicity of suits.

3. That the Houmas grant was complete from Spain only to the extent of 42 arpents in depth, and that beyond this it was a vagrant or floating grant, not protected by the treaty of 1803.

4. That the act of 1858 did not apply by its terms to the Houmas grant, and if it did apply it was repealed before title passed out of the United States.

5. That the lands now in dispute were granted to the State of Louisiana by the United States by the act of March 2, 1849, and September 28, 1850, prior to any alleged confirmation to the Houmas claimants.

6. That if it be held that the grant was confirmed by the act of 1858, unaffected by the repeal, its extent in the rear must be limited to the line marked A B on the plat, at page 36 of the record.

I.

The act sought to be enjoined is the right of the State to sell land to which she claims title. Commenting on this question in the leading case of Osborn vs. the Bank, 9 Wh. 738, Chief-Justice Marshall makes a very reasonable exception to the rule established by that case. He says: "Jurisdiction is expressly granted to the circuit court in those cases only where citizens of the same State claim lands under grants from different States. If the claimants be citizens of different States the court

takes jurisdiction for that reason. Still, the right of a State to grant is the essential point in which the State is deeply interested. If that interest converts the State into a party there is an end of the cause, for the constitution will be construed to forbid the circuit court to take cognizance."

To the same effect is the opinion of Mr. Justice Bradley in Branch vs. the Macon and Brunswick Railroad Co., 2 Woods 385, and of Mr. Justice Woods in Cunningham vs. the same, 3 Woods 424.

Since, as we shall show, complainants were not entitled to resort to a court of equity to quiet their title, not being in possession of the land in dispute, the bill is, in effect, a bill to contest the title of the State. But the suit is against an officer of the State who has neither possession of or title to the property.

Gray vs. Davis, 16 W. 203, is not authority to support the present action. In that case the legal title to the lands was in the State and the equitable title in the plaintiff, and thus there was a trust involved, which, of itself, created a case of equitable cognizance. Moreover, there was no question but that the complainant was in possession of the lands, and from that fact also he was entitled to relief against any attempt to place a cloud upon his title.

II.

A court of equity will not entertain a bill by a person out of possession, to quiet his alleged title,

or to prevent or remove a cloud; nor a bill to eject a *single* defendant under pretense of preventing a multiplicity of suits.

The bill nowhere avers that complainants were in possession when it was filed. The only allegation on this point is, that Maurice Conway was put in possession of the first 42 arpents in depth in 1776.

On the contrary, the bill at page 4, rebuts any presumption of such possession, for it avers that since February 17, 1829 (the date of Turner's survey), "the United States have maintained, and from time "to time asserted, by sales, preëmption entries, "grants to the State, and other hostile pretensions, "their rights as proprietors to all lands in the Hou- "mas claim back of the 42 arpents."

The survey of Andry stopped at forty-two arpents in depth, which fixed the actual possession of Maurice Conway at that limit; it being left for him to extend his lines to the river and lake whenever it should suit his interests and convenience to do so.

In the absence of any averment and proof that he ever exercised this right, we may and must conclude that he never extended his possession beyond the limits of the survey.

In High on Injunction, section 274, it is said that a bill to enjoin based upon title will be dismissed for want of equity where the complainant is out of possession and has not brought a suit at law to establish title. Blackwood vs. Van Vleet, 11 Michigan, 251.

The reason of this rule is that a party out of possession has an ample remedy at law, but one in possession has no remedy save in equity.

Milford on Pleading, 146, says that in most cases it is held that the plaintiff ought to establish his right by the determination of a court of law, in his favor, before he files a bill in equity; and that if he has not done so, and the right he claims has not the sanction of long possession, a demurrer will hold.

Says Mr. Justice Grice in Orton vs. Smith, 18 H. 565: "Those only who have a clear legal title to land, *connected with possession*, have any right to claim the interference of a court of equity to give them peace, or to dissipate a cloud upon their title." See also Ward vs. Chamberlin, 2 Black. 430, 444 West vs. Schembly, 54 Ill. 523, Huntington vs' Allen, 44 Miss. 654; Stark vs. Starrs, 6 Wall. 402.

And where defendant's title is merely of doubtful validity, it is more than a cloud, and he is entitled to have it tried at law. Overton vs. Foote, 43 N. Y. 290; Meloy vs. Daugherty, 16 Wis. 269.

Says the Supreme Court of Mississippi, in Phelps vs. Harris, 51 Miss. 789: "This jurisdiction of equity cannot properly be invoked to adjudicate upon *conflicting* titles to real estate. That would be to draw into a court of equity, from the courts of law, the trial of ejectment, and the proper forum to try titles to land, is in a court of law, and this

jurisdiction cannot be withdrawn at pleasure and transferred to the courts of equity under the pretense of removing clouds from title." See also the opinion of Justice Matthews, in Chamberlin vs. Marshal, reported in the December, 1881, number of Copp's Land Owner, page 145.

In Louisiana we have the action of slander of title, as the equivalent of a bill of peace, but it can be exercised only by persons in possession of the property. Van Wyche vs. Gaines, 13 A. 245; Arrowsmith vs. Durell, 14 A. 849.

And the rule contended for prevails in all the States of the Union, except, it may be, in California and Nevada, and in some of the territories, where it has been changed by statute.

But it is contended that the bill should be maintained to prevent a multiplicity of suits.

It may be conceded that actions at law may be prosecuted in equity against numerous defendants to save a multiplicity of suits. Trenham vs. Herbert, 2 Atkyns 483.

But the jurisdiction necessarily depends in all such cases upon the fact whether there are numerous defendants named in the bill. So in Trenham vs. Herbert, supra, the court dismissed the case, because the bill presented but a single issue to try title between two persons. Eloge vs. Hill, 2 Johns. Ch. 281.

Where the prevention of a multiplicity of suits is

the ground of equitable jurisdiction, it should appear from the averments of the bill that there are numerous persons whom the plaintiff will be compelled to proceed against separately at law, or that such persons will vex him by numerous suits to enforce some claim they have derived from a common source. Thus, the proper office of a bill of peace is to bring these parties all before the court in one proceeding, so that their rights may be settled by a single decree. Woods vs. Monroe, 17 Mich. 238.

Here we have but a single defendant, and a decree against him will determine nothing as against persons who had purchased lands of the State prior to the filing of this bill.

If the fear that an adverse claimant may sell the land in dispute to numerous persons will authorize a court of equity to take jurisdiction of an action to try title, every case of ejectment may be prosecuted in chancery.

The right of action against numerous defendants must exist to warrant the bill, not the mere fear or expectation that such a right may arise in the future.

III.

The Houmas grant was a complete grant from Spain to the extent of 42 arpents in depth only.

The regulations of O'Reilly, prescribing the mode of disposing of the public lands in the territory of

Louisiana, required the boundaries of all grants to be fixed by a survey. 2 White's Recopilation 228.

Maurice Conway applied for a grant under these regulations in 1776, representing that there was a space of a league and a half between the lands he had then in cultivation and the cypress timber, which he did not own; that he desired a grant of *all the back* lands to enable him to reach this cypress timber, and obtain necessary fencing, etc., for the use of his plantation.

The application was granted, and Louis Andry, a surveyor, was ordered to fix the boundaries of the grant and put him in possession. Andry went on the land, fixed Conway's front at 96 arpents on the river, and ran the side lines to a depth of 42 arpents. Nothing in the survey shows that "all the back lands" asked for in the original application included all the lands lying between the 42 arpents and Amite river. The survey simply stopped at 42 arpents back from the Mississippi river. 2 White's Recopilation, page 411.

The survey thus made was approved, and it constitutes the only tangible and real grant ever made to Maurice Conway. The survey and approval constituted that severance from the public domain which the courts have held to be necessary to make a valid Spanish grant. Choteau vs. Eckart, 2 H. 375; D'Autrive vs. U. S., 101 U. S. 700; Lecompte vs. U. S., 11 H. 127.

Conway remained satisfied with the grant until after the cession of the territory to the United States, when we find that his pretensions began to expand. The bill does not aver that the grant extended beyond the 42 arpents actually surveyed, but it alleges that it was intended that the side lines should be extended back to Bayou Mauchac and Lake Maurepas in the same general direction, *whenever* it might suit the *convenience and interest* of Maurice Conway to do so. It is not, however, averred or shown, that either he or his grantees had ever found it to their interest, or had elected to have them so extended, prior to the cession of the territory to the United States.

It thus appears from the bill that Conway obtained at most but an option from the Spanish government to acquire a title to the back lands which he could exercise, or not, to suit his convenience. Such grants have been styled vagrant or floating grants, conferring no title until located. When not located before the cession, they have always been held to be void. Smith vs. United States, 10 P. 326.

It was not until the United States took possession of the territory that Conway's pretensions began to assume their present proportions. He then presented a petition to Governor Claiborne asking to have the boundaries of his grant established. Governor Claiborne accordingly directed one Lafon, in

December, 1803, to *show Conway his lines*, but he did not order a survey.

But Governor Claiborne had no authority to order a survey, even if his order contemplated one.

The act providing for the appointment of a military and civil governor, of the territory conferred upon him the same authority, during that session of congress only, as was then exercised by the Spanish governors. But the act did not authorize him to dispose of or survey the public lands. 2 Statutes 240.

The session began October 17, 1803, and ended March 27, 1804.

On the 26th of March, 1804, an act was passed providing for the government of the territory. The fourth section prohibited the governor to sell or interfere with the public lands. 2 Statutes 283.

Attorney-General Clifford, in his opinion on this grant, says that the commission of Governor Claiborne forbade him to interfere with the public lands. 4 Opinions, page 643. And he does not appear to have attempted to do so, unless his direction to Lafon can be construed as a license to make a survey.

Even this so-called survey, printed at page 114 of the record, does not appear to have been returned to or approved by Governor Claiborne. In form it is a mere certificate of Lafon, made in February, 1806, probably delivered to some one of the Houmas claimants. It was made two years after Governor

Claiborne's authority to deal with the public lands had expired. It was, if a survey at all, a private one, cancelled by the third section of the act of February, 28, 1806. Jourdan vs. Barrett, 4 H. 185.

Moreover, the power to confirm a grant, or to extend its limits, was never confirmed by congress upon any surveyor. Conway himself did not consider this so-called survey as completing his grant, for we find him subsequently prosecuting his claim before the board and asking for a confirmation.

The petition filed before the commissioners claimed a tract of land with a front of twenty-two arpents on the Mississippi river, and a depth of 455 arpents on the lower and 351 arpents on the upper side line. *No rear boundary was given.* The favorable report is in the language of the claim; but the evidence upon which the board acted, and the exhibits annexed to the petition, if any there were, have not been produced in this case.

An alleged copy of Lafon's plans has been filed, however, but there is no proof showing that it was ever filed as part of the Conway claim. The certificate attached to the plan says it was filed in the case of the United States vs. Daniel Clark, record, page 99.

Concede, however, that it was filed in evidence to support this claim, it should not control the findings of the board which were made without reference to it.

Neither the favorable report of the board, nor the acts of the executive officers of the government in making surveys and plats, and writing letters before confirmation by congress, can create a grant, or complete a defective one, for the power to grant resides solely in congress under the constitution. Jourdan vs. Barrett, 4 H. 185.

But it is urged with great pertinacity that the original grant was complete, and that, by custom and usage, the words "*back lands*," used in the grant, cover all the lands back of the first concession to the limit of the jurisdiction of the governor of the territory, and that this jurisdiction was bounded on the east by the Amite river, the lake and the bayou.

The meaning of the term back lands has received the interpretation of this court in at least two cases.

Says the court in Jourdan vs. Barret, *supra:*

"That back lands at all times meant those in the "rear between the extended front lines in the rear "to the distance of forty arpents, we suppose to be "understood as a general rule."

In the D'Autrive case, 101 U. S. 700, the rule was reaffirmed in the following language:

"Back concessions were seldom made, and in no "instance of which there appears to be any authen- "tic account except to the front proprietor; and, "where made, uniformly had a depth of forty ar- "pents, reckoning from the rear line at the first "concession."

And this rule seems reasonable, in view of the form in which these grants were made.

Take the case of the present grant. At a time when there exi-ted no general surveys of the public lands in the territory, and their extent was practically unknown, Maurice Conway applied for the grant of a wood lot from which to obtain fencing for his plantation, and he was authorized, as the bill itself shows, to take what was in the rear of his estate for that purpose whenever it should suit his convenience and interest to do so. Unless aided by custom and usage, such a grant was inherently defective and void for uncertainty. Aided by usage, the grant is limited within what it may reasonably be supposed was intended to be granted.

It seems clear, therefore, that unless complainants can show a title from the United States, through the authority of an act of congress, they have no right to any lands lying back of the original grant of forty-two arpents, and the additional concession of forty arpents acquired by custom and usage.

IV.

Did the act of 1858, confirming certain favorable reports of the board of commissioners, include the Houmas grant? and, if so, what was the effect of the repeal of that act in 1860?

The act of 1858, in terms, purports to confirm the decisions made by P. Grimes, Joshua Lewis and

Thomas B. Robertson, found in the second volume of American State Papers (Duff Green's edition), between pages 224 and 376.

As a matter of fact, these three commissioners made the reports contained in this volume from page 224 to 257. The reports from 257 to 287, which include the Wm. Conway claim, in the first column of page 287, were signed by only two of the commissioners, Joshua Lews and Thomas B. Robertson. And Robertson, though he signed the report, says in a note, that he dissented. Such a report can hardly be said to be favorable, within the meaning of the act.

To make out title through the act of 1858, the complainants were bound to aver and prove that the report on the William Conway claim was made by these three commissioners. Without averring this essential fact, the bill states, by way of *argument*, that the act was *intended* to confirm the claim. The evidence to support this clause in the bill consists of an unsigned copy extract from the report of the decision of the two commissioners above named, to be found at page 150 of the record. Unless, therefore, the court can go to the reports themselves, as found in the 2d volume of the American State papers, which are a part of the act of 1858, by adoption, the complainants have not made out their title, even if they have one through that act.

Taking the act of 1858 and the State papers

together, as a whole, however, should the statute be held, by intendment and inference, to cover the reports made by only two of the commissioners. This presents a question of the construction of a grant.

The act of 1858 is perfectly clear and unambiguous, and its purpose is only made uncertain when we go outside of the statute to find the supposed intent of congress in passing it. But if there be any ambiguity in either the words or purpose of a law which creates a private grant, it should always be construed against the grantee and in favor of the sovereign. Nothing can be taken against the State by inference. What is not granted is withheld.

Says Lord Ellenborough, in Gildart vs. Gladstone, 1st East. 675: "If the words used would fairly admit of a different meaning, it would be right to adopt that which is more favorable to the public interests." And he gives as a reason for the rule that acts conferring private grants are generally drawn up by the parties to be benefitted by them, who are presumed to claim all they are entitled to. This rule has been quoted with approval and followed by this court in numerous cases. Charles River Bridge vs. Warren River Bridge, 10 Pet. 420; Dubuque R. R. Co. vs. Litchfield, 23 H. 66; the Delaware R. R. Tax, 18 Wallace 205.

It is urged that congress must have intended to include all reports made by the board, because the 5th section of the act of 1805 (2 Statutes 327) au-

thorized a majority of commissioners to hear and determine any claim submitted to them.

So far from this fact being a ground in favor of the construction contended for, it leads to a contrary conclusion, for by naming the three commissioners it indicates that congress refused to confirm the report of two of them, for a good reason. If congress had intended to act on the report of the board, without regard to the number of commissioners who acted, they would have said so.

It may be that congress confirmed all the favorable reports made by the three commissioners, because they appear to have rejected many of the claims submitted to the full board; whereas it appears that the two commissioners affirmed nearly all the claims acted upon by them.

Should your honors, however, hold that the act of 1858 included the Wm. Conway portion of the Houmas grant, and was intended to confirm it, the bill is fatally defective in not averring compliance with the terms of confirmation.

The 3d section of the act (11 Statutes 294) provides that the register of the proper land office shall make out a certificate of location, to be transmitted to the commissioner of the land office. "And if it shall "appear to the satisfaction of the said commissioner "that said certificate has been fairly obtained ac- "cording to the *true intent and meaning* of this act, "then, and in that case, patents shall issue." There

can be no doubt as to the meaning of these clauses of the act. They operated as a withholding of the grant until the commissioner should decide upon the fairness of the location, and until a patent was issued. Until then no title passed or could pass to the grantees. The location, the decision of the commissioner and patent, when issued, were to constitute the relinquishment.

It is not averred that any single one of these acts have been performed. But this want of averment is attempted to be supplied by proofs at the trial. The proof consists of a certificate of location made by the register of the land office at New Orleans, together with a letter of the commissioner of the land office, dated January 11th, 1859, submitting the questions involved in the case to the secretary of the interior, and a letter from the latter disapproving the application for patent. Record, pages 66–7.

Even this proof does not show a decision by the commissioner, if it can be considered, for the commissioner remitted the question to his superior, the secretary of the interior, who decided against the complainants.

If we are correct in our interpretation of the 3d section of the act, the location, the favorable decision of the commissioner and delivery of patent, were conditions precedent to the taking effect of the grant.

No right could vest in the grantee until perform-

ance of the conidtions, and courts of equity are without power to give relief. Davis vs. Gray, 16 Wallace 229.

This court cannot perform these acts, delegated by law to the officers of the government. The grounds upon which the officers have refused to act cannot be considered; but they were clearly justified in withholding the title after congress declared, in the act of 1860, that they refused to confirm to the claimants the lands embraced in the Houmas grant.

It may be conceded, that if the act of 1858 had gone into effect, and vested title in the claimants, the grantees could not be divested by its subsequent repeal. But the act of 1858 was still an incomplete and unexecuted grant. In this respect the government stood in the same position as a donor who has promised to make a gift of land when he shall select it. The gift is executory, and cannot be enforced until after selection; and until selected, the title remains in the donor, whom the courts cannot compel to make a conveyance. The act of 1860 is not the repeal of a grant, but a declaration by the United States that they will not execute a promised donation. The case is similar in principle to Rice vs. Railroad Co., 1 Black., page 358, where it was held competent for congress to repeal a grant, at any time prior to a complete relinquishment of title.

The case of Schulenberg vs. Harriman, 21 Wal-

lace, page 44, does not declare a different principle. It is still a question of construction, in all cases, whether the statute, by its terms, has created a grant in *presenti*, or upon condition pecedent. But even a grant in *presenti* of lands thereafter to be selected, has no standing in the courts until precision is given to it by complete location.

In this last case it appeared that the lands had been located according to the statute, and that the United States had not arrested the completion of the grant by any action whatever.

V.

The grant was clearly incomplete, as we have already shown, so far as a claim is made for lands back of the first concession of forty-two arpents, and it was within the power of congress to dispose of the land, unless there has been a reservation.

The act of 1849 granted these lands to the State, unless reserved from the grant within the legal intent of the words "claimed or held," to be found in the second section of the act. But if that reservation was operative, it was within the right of a subsequent congress to revoke it, and to grant the lands free of the reservation. This congress did in the act of 1850, which donated all swamp lands then unsold to the respective States in which they were situated. Ham vs. Missouri, 18 H. 126.

Independently of the act of 1850, however, can

it be said that these lands were "claimed or held" by William Conway or the complainants?

It must be remembered that the object of our government, from the date of the cession of Louisiana, has always been to compel the holders of claims of the character involved in this suit to present them, in some manner, for settlement, so that the public domain might be separated from what was private property.

Soon after the acquisition of the territory of Louisiana, the act of March 2, 1805, 2 Statutes, page 324, providing a special tribunal to adjust land claims, was passed. This act required the evidence of all complete grants to be filed with the register of the proper land office, and provided that incomplete grants should be submitted to the board for adjudication.

The report of this board, where the claim exceeded one square league in extent, was required to be submitted to congress for final decision.

Wm. Conway, considering that his claim was incomplete, went before the board, and asked for a confirmation. His claim was reported on favorably by the two commissioners to the extent set forth in his petition, and the report was transmitted to congress for final decision, January 9, 1812, but congress refused to confirm it.

Subsequently, two additional acts were passed, creating new boards to adjust all unconfirmed claims to land in Louisiana. 4 Statutes, pages 561 and 749.

The claimants refused and neglected to avail themselves of these acts of grace.

In 1824 congress passed an act for the final adjustment of *unconfirmed* claims to land in Missouri and Arkansas.

This act required claimants to bring suit in the United States District Court for the district of Missouri, against the United States, for an adjudication of their *unconfirmed* claims. The fifth section of this act declared that any claim not presented within two years from the passage of this act should be forever barred, both in law and equity, "and no proceeding shall ever thereafter be sustained in any court touching such claim." 4 Statutes, page 52.

This act was extended to Louisiana by the act of June, 1844. 5 Statutes 676.

No claim was ever made by plaintiffs under the act of 1832 or 1835, nor has suit been brought under the act of 1824 as extended to Louisiana by the act of 1844. See admission, record, page 149.

The Supreme Court, in U. S. vs. Poché, 12 H. 426, has applied the provisions and enforced the bar, contained in the act of 1824, to claims in Louisiana.

The claim of Conway was clearly incomplete, and came under the jurisdiction of the district court, under the rule in U. S. vs. D'Autrive, 15 H., page 14.

We say incomplete, because the grant to Maurice

Conway was not surveyed beyond forty-two arpents in depth, and whatever the right he had beyond that, depended, as the bill avers, upon usage and custom, and upon the further fact whether he should "find it to his convenience and interest" to claim the benefit of that usage, which, it is alleged, entitled him to extend his side lines to the river and lake in the rear. This mere right or option to acquire the back lands, if it existed, as alleged, prior to the cession of the territory to the United States, was avoided by the cession, as has been uniformly held by this court, as a vagrant and unlocated grant.

Complete titles required no action to confirm them, but incomplete ones could only become valid in the manner provided by the legislation of congress.

Being of the latter character, the plaintiff's claim was barred at the date of the passage of the act of 1849, because not presented for adjudication as required by law.

The consequence of the bar, as declared by the 7th section of the act of 1824, extended to Louisiana by the law of 1844, was to make all the lands included in the claim so barred, "a part of the public "domain of the United States, and subject to the "same disposition as any other public land in the "same district." This restored the lands to grant, if they were ever excluded.

It follows that the lands included in the Houmas claim were, on the 2d day of March, 1849, and Sep-

tember 28, 1850, the property of the United States, and being thus free from the claims of these plaintiffs, they were conveyed by the grant to the State of Louisiana.

The power of congress to thus deal with land claims has been affirmed by the Supreme Court in numerous cases. Strothers vs. Lucas, 12 Peters, page 411; Harcourt vs. Gaillard, 12 Wh. 528; Delacroix vs. Chamberlain, 12 Wh. 601–2.

Claims thus barred, says the Supreme Court, in the first case, "cannot be offered in evidence in any court against any person claiming a grant from congress."

In the light of these laws, can it be said that the plaintiffs claimed or held the Houmas lands within the meaning of the act of 1849.

The word claimed undoubtedly referred to lands for which a claim had been legally made under some law in force at the date of the act, and which was then pending—a claim of record, made in compliance with existing laws, not a vague assertion of a claim which a party may have conceived to be valid, but not presented for the action of the government in the mode then prescribed by law.

Claims filed prior to June 17, 1846, in the district court of the United States, were undoubtedly protected by the reservation; but claims forfeited under the law, as it existed at the passage of the act of 1849, cannot be called a claim by any rule of construction. The

right to make a claim having been extinguished, the claim itself had no existence in law or in fact at the time congress granted the lands to the State of Louisiana.

The act of 1844 was intended to provide a final adjustment of all land claims in Louisiana then unconfirmed.

It was effective for the purposes declared, unless it can be shown to be unconstitutional and void, and this has not been attempted.

Were the lands HELD by plaintiffs within the meaning of the act of 1849?

The plaintiffs must allege and show that they come within the proviso of the act of 1849. They must establish the exception as being within the words and the reason thereof. Ryan vs. Carter, 93 U. S. 83.

The term *held*, in view of the manifest purposes of congress, must be construed to cover only such lands as were occupied by persons under some lawful claim of title, such as entry, preëmption, etc., sanctioned by law at that time. It cannot be that mere squatters upon the public domain, and persons whose right to claim land had been barred and forfeited under the provisions of the act of 1824 and 1844, were intended to be protected by the reservation in the act of 1849. These plaintiffs cannot be heard to say that they held land which an act of congress had previously declared to be public prop-

erty, for the whole purpose of the reservation was to preserve the faith of the government with those settlers who had, in good faith, taken the initial step necessary to ultimately entitle them to patents. It was not until June 22, 1860 (12 Statutes 85), that congress made provision for adjustment of claims forfeited under the acts of 1824 and 1844. But the rights acquired to this class of lands were carefully guarded by a provision giving to the claimants scrip for the amount which had been sold or granted in the meantime.

The benefits of the act were again extended in 1867, but whatever may be the effect of these acts between the plaintiff and the government, it is manifest that they could not, nor were they intended to disturb the rights vested in the State by the prior acts of 1849 and 1850.

Nor does the sixth section of the act of 1811 (2 Statutes, page 662), withdrawing the lands from sale until after the final decision of congress, help complainants. The Houmas grant, together with others, was laid before congress January 9th, 1812 (2 American State papers, page 224). Refusal of congress to confirm the Houmas claim, and the subsequent acts of congress, remitting all unconfirmed claims for final settlement to other tribunals, under pain of forfeiture, constitute final decision by congress upon the claim. Forfeiture of the claim had accrued under these acts when the grant was made to the State.

The uniform purpose of congress has been to compel a speedy adjudication of this class of claims. It is not reasonable, therefore, to suppose that the act of 1811 was intended to have the effect of withdrawing these lands from the power of congress, to grant, for all time, or until some future congress might remit the forfeiture, and give what a previous congress had refnsed. Sawyer vs. Newhall, 2 Otto, page 765, does not conflict with these views, for the right to claim had not been forfeited after the passage of the act of 1851.

It seems perfectly clear to us that the lands in dispute were the property of the United States, at the date of the passage of the acts of 1849 and 1850, not claimed or held by these complainants within the meaning of the law, and that they passed to the State of Louisiana by an indefeasible title. And, further, that if anything was reserved by the act of 1849, it was conveyed to the State by the absolute and conditional terms of the act of 1850.

VI.

If your honors should hold, either that the Spanish grant is valid beyond forty-two arpents in depth, or that it has been made so by the act of 1858, its extent becomes a material question.

In the first place, we contend that the claim depends solely on the act of 1858, so far as it is alleged to cover any lands back of the first forty arpents.

If that act is held to be irrepealable, the claimants are bound to accept it as the measure of their title. We go further, and say that if the Spanish grant was complete to the extent claimed, without the aid of confirmation, still the confirmation operates as a limitation of the claim within the boundaries contained in the act of confirmation.

Having voluntarily invoked the judgment of the board, and the action of congress as to the validity and extent of their titles, the present plaintiffs are bound by the decision. They cannot accept the decision, and at the same time reject the description under which the grant was made. See United States vs. King, 3 H., page 737.

The petition of Mr. Conway, filed before the board, described the land claimed to be a tract twenty-two and a half arpents front on the Mississippi river, by a depth on the lower side line of four hundred and fifty-five arpents, and on the upper line of three hundred and fifty-one arpents.

The confirmation was in the very language of the petition. He estopped himself from afterwards claiming a greater quantity, whether the confirmation limited him or not. But it is manifest that the petition of Conway and the confirmation, taken together, constitute the best evidence of the extent of the grant.

While complainants admit that the upper line lacks forty-five arpents, and the lower line one hun-

dred and twenty-five arpents of reaching the river and the lake, they still insist that they should be held to reach these two points, and that the meanderings of the Amite river should form the rear boundary.

The description given by Conway of his claim which was adopted by the board, is as follows:

"No. 125. Wm. Conway claims a tract of land "situate in the county of Arcadia, at a place called "Houmas, on the left bank of the Mississippi, con- "taining twenty-two and a half arpents front, with "an opening towards the rear of sixty degrees and "forty-five minutes, the upper line running north "ninety degrees and fifteen minutes east, three "hundred and fifty-one arpents, and the lower line "directed north seventy degrees east, and measuring "four hundred and fifty-five arpents, bounded on "the upper side by Daniel Clark's lands, and on the "lower by the land of Simon L'Aneux."

Nothing is here said about natural monuments, but the description is wholly by courses and distances.

An effort is made to enlarge these boundaries by reference to the evidence on which it is alleged the board acted. Even if it is competent to resort to the evidence for such a purpose, the whole testimony is not before the court. The map made by Lafon—at best a mere private survey, neither made by authority of the board, or of any law of the United

States—is offered; but there is nothing to show that it was ever laid before the board. On the contrary, the certificate attached to it says it was filed in certain cases before the board, but it does not state that it was filed in the William Conway claim.

But this court cannot usurp the functions of the board, and enlarge or vary the findings of that tribunal. Confirmations of this character says the Supreme Court, in Tameling vs. U. S., 3 Otto 644, "are not subject to judicial review."

The court may ascertain what was decided by the board, but in construing the finding it should be governed by the rules relating to the interpretation of decrees and judgments.

The description of the land claimed and confirmed to Wm. Conway by the board, needs no aid of construction. The presumption is that he asked for what he wanted, and it appears from the finding that he got what he asked for in precise terms.

Had the board confirmed the claim by reference to the river and lake, courses and distances would have to yield to the natural objects.

The rule in such case is clearly stated in Morrow vs. Whiting, 5 Otto 551: "In a description of prem-"ises, distance and quantities, when *inconsistent* "wtth metes and bounds, must yield to them."

In this case we have to deal with a title wholly governed by courses and distances, and they must be our sole guide. McIvers vs. Walker, 4 Wh. 444.

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In this case we have to deal with a title wholly governed by courses and distances, and they must be our sole guide. McIvers vs. Walker, 4 Wh. 444.

Complainants' title calls for land inclosed within a certain front line and two side lines of a given depth. If the description had specified that the side lines extended four hundred and fifty-five arpents back to the lake on the lower side, and three hundred and fifty-one arpents back to the river on the upper side, we concede that the distances, if erroneous, would yield to the natural objects.

If the description be added to, by interpolating other calls, the effect will be to introduce an inconsistency into the grant not found in the original. Complainants ask this court to create an uncertainty, and then construe the grant to their advantage. As well might they ask the court to make a new grant.

It is urged in argument that the report of the board is a mere recognition of the broader title acquired by Conway under the original Spanish grant. It is a sufficient answer to this argument for us to say that the grant, even supplemented by usage and custom, is of less extent than the confirmation, as we have demonstrated in the first part of our brief.

The lands claimed by Conway, and as acted upon by the commissioners and reported to congress, were bounded in front by the Mississippi river, and by two side lines of a specified depth, but the rear boundary was not given; and the act of 1858, if it applied, did not give them a rear boundary.

Even if the register has made a location, and the

commissioner approved it, under the 3d section of the act of 1858, they had no power or authority to extend the side lines beyond the distances fixed by congress, and thus enlarge the grant. Beyond running the side lines in their true direction to the distance limited by congress, and closing the rear boundary by a straight line drawn from the rear end of the lower to the rear end of the upper side line, as shown by the line A B in the plat, no ministerial officer could bind the United States by survey, plat, patent plat or certificate of location. See United States vs. Forbes, 15 P. 173.

Any survey which extends the lines of confirmation several miles beyond the limits assigned by congress, and then takes the meanderings of a river for a rear boundary, is so palpably wrong that a court of equity will presume that it was made in error, if not conceived in fraud.

The location, then, if made, is void, because not made pursuant to the act of 1858 It was not a compliance with the law in fact, and it purports to be so only by pretense.

While it is true that the courts cannot revise the findings of an officer to whom a power has been delegated, they may still determine whether the officer has acted within the authority conferred upon him by statute. And it was within the power and right of the United States to disapprove any survey which did not correspond with the land granted, though

the certificate may declare it to be at the proper place. United States vs. Breward, 16 Pet. 143.

This congress did, in the joint resolution of 1859, suspending action by the department before final decision, and subsequently by the act of 1860.

The cases in which it has been held that the action of the executive officers on all questions confided to their decision cannot be impeached collaterally, were cases at law, where there had been final decision, and a patent had issued for the land in dispute. Were the complainants suing for possession of the land at law through a title by patent, it may be conceded that the patent could not be impeached by evidence of error, mistake or fraud in the department charged with the sale of the public lands. Such has been the uniform decision of this court. Smelting Co. vs. Kemp, 104 U. S. 637.

But this is not an action at law, nor have the complainants a patent. They claim through a grant which, it is claimed, has been enlarged by a survey, though the survey has been set aside and cancelled before it was finally approved by the secretary of the interior, and before issue of patent.

A court of equity may give complainants all the grant calls for, but no more; and in this respect they are in no better condition than they would be if they had a patent describing the land by the courses and distances contained in the supposed act of confirmation.

If the location relied upon by the complainants is not properly before the court, or if it is void for the other causes we have urged, the grant has no defined rear boundary, and the courts cannot deal with the questions presented in the case, for a new survey, conforming with the grant, will be required. This is an executive act which the court cannot perform. Snider vs. Sickles, 8 Otto 203; Maguire vs. Tyler, 8 Wallace 660.

The surveys made between 1806 and 1858 do not aid the complainants, for there was no authority for them in law. And if they were authorized, which one would the court adopt? The Turner survey of 1839 limited the grant to forty-two arpents, and declared all the land in the rear to be public. This the bill itself avers; and it further avers, that Attorney-General Clifford sent to the president an opinion, on the 31st day of December, 1847, in which he declared, after a review of all the facts, that the Houmas claim had not been confirmed by any act of congress, and that all the patent plats, patent certificates, surveys and other evidences of title issued therein, were utterly null and void as issued without authority of law. So that, so far from recognizing any of the surveys now relied upon to supplement the act of 1858, the United States has repudiated them constantly for the last seventy-five years, in every possible manner. And yet it is now argued that these unauthorized and repudiated acts

should be considered as incorporated into the act of 1858, as a measure of the extent of the grant; and that they dispense with the necessity of a survey and location.

Again, it is contended that the grant is itself a location, without the necessity of a survey, yet it is at the same time argued that its boundaries should be enlarged and extended, by reference to some of the surveys, plats or certificates which are now claimed to be unnecessary.

Counsel for the appellant proceeds upon the theory, throughout his whole argument, that the existence of the grant can be made out by inference and construction, and that it can be enlarged in the same manner, notwithstanding the well-settled rule of law that nothing can be implied against the State in the case of a private grant. The argument is interesting, though not novel; but titles of real estate are not made out in that way.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellee.

111-412

SUPREME COURT U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1883.

No. 916.

ALFRED SLIDELL ET ALS., APPELLANTS,

versus

THOMAS J. EMLER ET ALS., APPELLEES.

BRIEF FOR APPELLEES.

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellees.

F. F. Hansell, Stationer and Printer, 30 Camp Street, New Orleans.

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BRIEF FOR APPELLEES.

The bill in this case is brought by a large number of persons, nearly all of whom are citizens of Louisiana, against forty-two defendants, who are citizens of the same State.

It charges some of the defendants with trespasses upon the lands included within the alleged limits of the Houmas grant: some with buying logs cut upon those lands, and others with aiding the alleged trespassers by selling them food, clothing and the necessaries of life, and by advising with them.

It avers that the front portion of the lands is in actual use as a sugar plantation; and that the swampy portion in the rear is occupied by these alleged trespassers, who are abusively styled *squatters*, without title.

It further avers that these trespassers dispute the validity of the Houmas grant, and claim that the title to the lands is in the United States, or the State of Louisiana, *or at least that the complainants have no title.*

This clause of the bill is supposed to tender an issue involving a federal question.

The real purpose of the bill is to obtain a decision upon the validity of the complainants' title, under cover of a suit to prevent threatened trespasses.

ARGUMENT.

I.

Since it appears from the bill that at least three-fourths of the complainants and all the defendants are citizens of the State of Louisiana, the circuit court had no jurisdiction of the cause, unless a federal question is involved.

To ascertain whether such a question is presented in a case filed in a circuit court of the United States, we must ascertain what are the issues to be tried.

In an action to prevent threatened trespasses upon property by injunction, the issues are necessarily the same as in trespass at law. In both cases it is the *possession* of the plaintiff which is sought to be protected or vindicated.

In some of the States an action of trespass to try title has been substituted for ejectment by statute, but this form of action has not been adopted in Louisiana.

In Louisiana the only question to be tried in an action of trespass is, was the plaintiff in possession and did the defendant disturb him?

This is the rule of the common law also. Campbell vs. Arnold, 3 Johns. 468; 4 Kent Com. 119.

In some of the States it has been held that a defendant may justify by showing that he acted under authority of a third person, who had lawful right to the possession of the premises. Everett vs. Smith, Busbee (N. C.) 303.

But a bare *tort feasor* cannot set up in defence the title of a third person, between whom and himself there is no privity or connection. Branch vs. Doane. 18 Conn. 233.

In justifying under a third person, the defendant must show both the title and the possession of that person. Chambers vs. Donaldson, 11 East. 65; Merrill vs. Burbank, 23 Me. 538; Reed vs. Price, 30 Md. 442; Dunlap vs. Geeddin, 31 Me. 510.

The bill does not aver that defendants will attempt to plead a license from any person whatever as a justification, but merely recites that they claim, in common with other persons, that the lands in dispute belong to the United States, or to the State of Louisiana, and not to the complainants.

If they should plead, what it is said they thus claim, it would be no defence in law to an action of trespass, or to the bill.

The substance of the bill is that complainants

own these lands through a title from the United States. Their right to relief dèpends upon the fact of their actual possession. If they can show that a plea of title in the United States or the State is no lawful defence to the action, can it then be said that the suit "really and substantially involves a dispute or controversy," arising under the constitution or laws of the United States, within the provisions of the act of 3d March, 1875? We submit that it does not; for if the bill will lie at all in a court of equity, the pleas which it is supposed the defendants will file are inadmissible as a defence. If filed, they would raise no issue, but, in effect, would be a confession by the defendants that they were naked *tort feasors*.

The fifth section of the act of March 3d, 1875, gives the court power to dismiss a case at any time, whenever it shall appear that a federal question is not really and substantially involved. No such question can arise when the right to the relief sought depends solely upon the possession of the plaintiffs. The bill, therefore, in this case, must be changed from one to enjoin a trespass into a bill to test title before the construction of an act of congress can possibly arise. We would then have a suit in ejectment against defendants, who, it is asserted, are out of possession, and this cannot be maintained.

II.

The bill is clearly demurrable for being multifarious.

It is against numerous defendants, many of whom are not occupants, or averred to be trespassers. According to the complainants' own theory, those of them who are merchants and owners of schooners, dealing with the produce of the land, cannot in any aspect of the case tender an issue of title, nor be held for any trespass.

The issues to be tried between the complainants and the several defendants are different. The right of a merchant to buy the produce of even a squatter, or to sell him the necessaries of life, is an issue quite independent of the right of the squatter to occupy the land in dispute.

The bill really contains two causes of action—one to protect the complainants' supposed possession, and another to test their title. Each is governed by rules of law peculiar to itself. They are inconsistent with each other.

To enjoin the alleged trespasses, complainants must be in possession. To enforce title, they must be out of possession.

The bill is, therefore, multifarious for containing two causes of action, and also for containing a great number of defendants, between whom and the complainants the issues are separate and different. Dilly vs. Doig, 2 Vesy, jr. 486.

III.

Complainants are not entitled to the relief prayed.

They have brought no suit at law to try title against the occupants of the land.

When a defendant is in possession, an injunction to stay waste will not be granted except in aid of a suit at law to try title. Bogy vs. Schoot, 4 Jones Eq. 174; Wright vs. Grist, 1 Busb. Eq. 203; 2 Story Eq. Jur., sec. 911; 3 Blackstone 227; Kinsler vs. Clark, 2 Hill, ch. 617.

And even in this case an injunction will be refused unless trees, the cutting of which is sought to be enjoined, have some special value. Green vs. Kellar, 4 Md. 98. Nor though the trees constitute the chief value of the lands. Shreve vs. Black, 3 Greens, ch. 177.

To warrant an injunction to stay waste, title must be first established at law, and the injury must be irreparable. 2 Greens, ch. 279; Gause vs. Perkins, 3 Jones Eq. 177; Schreimer vs. St. Paul, 8 Minn. 113; Hart vs. Mayer, 3 Paige 213.

The rule is admirably stated in Perry vs. Parker, 1 Woodbury & Minot 280: "It is well settled that if the title of each is not admitted, or made perfectly clear, no injunction will issue until it is made clear by a trial at law; and this trial will not be on affidavit, but on pleading and process."

But the law of Louisiana makes special provision as to the rights of possessors and owners.

Thus, in trespass, the only question is, was the plaintiff in possession, and did the defendant disturb him? Title cannot be put at issue. Blanc vs. Nolan, 2 A. 223.

So an owner, if he has been out of possession for more than a year, cannot oust the person, who has possessed adversely for that period, by the possessory action. C. P., article 49,

"Possession of land for more than a year creates such a presumption of ownership as will protect the possessor against the possessory action. It so far legalizes the possession as to authorize the possessor, during its continuance, to exercise acts of ownership without exposing him to an action for damages. Otherwise the protection given by the law to such ownership would be nugatory. The plaintiff can only proceed against him by the petitory action for the recovery of the land, and in that action the respective claims of the parties for improvements and rent can be adjusted." Willard vs. Richard, 13 A. 572.

The possession here referred to is actual, not civil or constructive.

Now the bill avers that the lands are occupied by defendants, who are mere squatters, without title.

Mere occupancy, for more than a year, protects a defendant, under the laws of Louisiana, against every action, save the petitory one.

It is difficult to see how complainants can possess lands which, they aver, are occupied by the defendants, and yet they must show this before they can obtain the aid of any court to protect their alleged lands from the use of the occupants.

The complainants, without showing the pendency of a suit at law to try their title, and confessedly out of possession, ask a court of equity to regulate the use which the occupant shall make of the land.

This is a thing which a court of equity never does, for it relieves only against waste, pending a suit at law for the land, or to protect the rights of a possesor against frequent and continued trespasses.

If, however, the bill may be entertained as a bill of ejectment, in which the title of complainants can be determined, the complainants must go out of court if they are in possession as claimed.

It is well settled in Louisiana, that an owner in possession cannot maintain this action. Delogney vs. Dixon, 5 La. 356; Girard vs. New Orleans, 13 A. 395.

If in possession, they cannot maintain ejectment. If out of possession, they cannot maintain a bill to quiet title or to prevent defendants from using the property as they see fit. They are in this dilemma through attempting to join two actions in a single bill.

The whole suit is merely a clumsy contrivance and attempt to boycott the parties in possession of the Houmas lands, and drive them away by the use of the writ of injunction. The court is asked to restrain the settlers upon these lands from cutting trees, which is their sole means of support, and at

the same time to enjoin any person from buying from them the produce of the lands, and from selling them the necessaries of life. They are to be starved out by an injunction, and their rights tried afterwards.

And this harsh proceeding is taken after the pretended owners have slept upon their alleged rights for seventy-five years, and an industrious community of two thousand souls have settled upon the lands, and occupied them for a peried of twenty years and upwards.

The laches of complainants alone should turn them out of a court of equity, which does not favor stale claims.

Under such circumstances, equity will not take away from a party what he may be entitled to at law, but it will not aid him in his pretensions.

On the question of the complainants' title, we submit herewith for your honors' consideration a copy of our brief in the case of Alfred Slidell et als. vs. James G. Richardson, register, etc., No. 588, argued with the present case.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellees.

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DEC 31 1883
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

No. 917.

ALFRED SLIDELL ET ALS., PLAINTIFFS IN ERROR,

versus

CHARLES TCHIRN, DEFENDANT IN ERROR.

Brief for Defendant in Error.

J. D. ROUSE,
WM. GRANT,
Attorneys for Defendant in Error.

E. F. Hansell, Stationer and Printer, 30 Camp Street, New Orleans.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

No. 917.

ALFRED SLIDELL ET ALS., PLAINTIFFS IN ERROR,

versus

CHARLES TOHIRN, DEFENDANT IN ERROR.

Brief for Defendant in Error.

STATEMENT.

This suit was brought in the circuit court to recover possession of certain cypress logs alleged to have been cut and removed from lands included in the Houmas grant. A writ of sequestration issued, and the logs were seized thereunder by the marshal.

The petition shows that the defendant and nearly all of the plaintiffs were citizens of the State of Louisiana. It describes the Houmas grant, and the proceedings connected with it, at great length; *but it does not set forth any title thereto in the plaintiffs.*

To this petition defendant filed an exception of no cause of action, and moved to quash the writ of

sequestration, both of which were sustained. We maintain—

1. That the circuit court had no jurisdiction of the parties or of the cause.

2. That it does not appear that the plaintiffs have title to the Houmas grant, or to the logs alleged to have been cut therefrom.

3. That the petition does not disclose any right to sequester the logs, even if plaintiffs own the land.

4. That the writ of sequestration wrongfully and improvidently issued, and was properly quashed.

ARGUMENT.

I.

The circuit court was without jurisdiction of the cause, unless it had jurisdiction by reason of the subject matter. It will be noted that the petition alleges a grant to Wm. Conway, but does not set up title from him to the plaintiffs.

In a subsequent clause the petition avers that defendant is in possession of a large number of cypress logs, "which have been unlawfully cut upon and removed from the said lands of petitioners."

But these "said lands" appear by the petition itself to belong to Wm. Conway. It is a matter, therefore, of indifference, whether the title of the latter is good or bad. It is not made an issue in this case, and it does not raise a federal question.

Not only was it necessary for the plaintiffs to show a title through this grant, but a conflict of title

between themselves and the defendant, involving the validity of the grant, to support the jurisdiction of the circuit court.

It does not appear from the petition whether the plaintiffs claim title through Wm. Conway, or from some other hostile source, even if it be conceded that they have averred ownership of the logs generally. The very fact upon which the jurisdiction depends is omitted. For aught that appears, the plaintiffs and defendant claim title from Wm. Conway, or from some other common source.

The averment that defendant denies that the Houmas grant is valid cannot affect plaintiffs' rights, since they do not claim title from Conway.

II.

The petition is defective, independently of the jurisdictional question, in not setting out the source of plaintiffs' title to the lands from which the logs are alleged to have been taken.

The petition is simply taken up with the details of Wm. Conway's supposed title to the Houmas lands. Reduced to its proper dimensions, it avers, in substance, that Wm. Conway became the owner of these lands by a grant from Spain in 1776, afterwards confirmed to him by congress in 1858; and that the defendant has cut and removed a large number of cypress logs from your petitioners' said lands.

This last averment is simply an opinion of the

plaintiffs that they own lands, title to which is stated to be in Wm. Conway.

If it be even an averment of ownership in the plaintiffs, it is insufficient in this, that it does not describe the title, and defendant cannot know whether the plaintiffs claim by patent, by French or Spanish grant, or whether they be original or derivative grantees. Bry vs. Fouché, 11 La. A. 665; Brown vs. Brown, 15 La. A. 169.

Where a defendant in a petitory action avers, in his answer, that he has a title to the land claimed by the plaintiff, but does not give its character or derivation, he will be considered as a mere trespasser. Broughton vs. King, 9 R. (La.) 215.

An action, therefore, for the recovery of real estate cannot be prosecuted or defended, under the practice of Louisiana, upon the general averment of title in the plaintiff or defendant, unaccompanied by a description of its nature and source.

In this case even general ownership is alleged casually and in doubtful language, and it is negatived by the prior clauses of the petition, which show, with great particularity, a supposed title in Wm. Conway, but no derivative title from him to plaintiffs.

Without title to the lands, the plaintiffs have none to the logs cut upon them, for their only right to the logs arises out of the alleged fact that they were taken from the lands.

III.

Since it is clear that the plaintiffs have not set up a title to the lands, they had no right to sequester the logs, unless they had possession of the lands, and could maintain trespass *de bonis asportatis*.

We maintain, further, that even if plaintiffs were owners, but out of possesion, they could not replevy the logs.

The rule seems well settled that the owner of property, wrongfully taken, has an election to sue for the trespass, or replevy the property; and that unless the action of trespass can be maintained, replevin will not lie. See Marshall vs. Davis, 1 Wendell 109, and cases cited.

Even an owner cannot maintain trespass *quare clausum fregit*, unless he had actual possession of the property at the time. Comyns Dig., vol. 6, page 390.

In trespass the only question to be tried is, did the plaintiff have possession, and has the defendant disturbed him? DeBlanc vs. Nolan, 2 A. 223.

So, an owner of land out of possession cannot replevin crops raised upon his land by one who occupies it. Stockwell vs. Phelps, 34 N. Y. 313; Cornelian vs. Brink, 29 Pa. St. 522; Pennybecker vs. McDougal, 46 Cal. 661; Sheldon vs. Clark, 1 Johnson R. 511.

In Louisiana an occupant without title cannot be disturbed by the true owner.

Says the Supreme Court of Louisiana, in Willard vs. Richards, 13 A. 572;

"Possession of land for more than a year creates such a presumption of ownership as will protect the possessor against the possessory action. It so far legalizes the possession as to authorize the possessor, during its continuance, to exercise acts of ownership without exposing him to an action of damages. Otherwise the protection given by law to such ownership would be nugatory. The plaintiff can only proceed against him by the petitory action for the recovery of the land, and in that action the respective claims of the parties for improvements and rents can be adjusted."

The remedy for an owner out of possession is by suit to evict, coupled with a claim for rents and profits. He cannot stand outside of the premises and seize the produce of the land on its way to market, or in the hands of a third person, merely because he may have a legal title to the land.

A possessor for a year, though without title, may, undoubtedly, sue for trespass upon such lands, or recover possession of logs taken from them. But plaintiffs no more aver possession in themselves than they do title.

The petition stops with an averment that Maurice Conway was put in possession of the first 42 arpents, but it is not alleged that William Conway succeeded to him to that extent. On the contrary, the peti-

tion shows that neither Maurice or William Conway have ever succeeded in obtaining control of the property, but avers that since February 17, 1829, and down to the date of the filing of the suit, "the United States have maintained, and from time to time have asserted by sales, preemption entries, grants to the State of Louisiana, and other hostile pretensions, their rights as proprietors to all the lands within the Houmas grant, lying back of the said 42 arpents." Record, page —. 10

But if the possession of plaintiffs were clear and undisputed, and their right to the logs should be held to result from that fact, the validity of the grant could not be put at issue, and the jurisdiction could not be maintained. The plaintiffs are thus in a dilemma. They cannot recover the logs unless the defendant committed a trespass in cutting them, and title cannot be put at issue in trespass. To make a case of jurisdiction, they must tender an issue of title, with a trespasser, which is inadmissible.

The exception of no cause of action and want of jurisdiction was therefore properly maintained.

IV.

The motion to quash the writ of sequestration was properly maintained.

The article of the Code of Practice authorizing the writ is as follows:

"Article 276. A plaintiff wishing to obtain an

order of sequestration in any of the cases above provided, must annex to the petition in which he prays for such order an affidavit, setting forth the cause for which he claims such order; he must, besides, execute his obligation in favor of the defendant for such sum as the court shall determine, with the surety of one good and solvent person, * * * to be responsible for such damages as the defendant shall sustain * *."

By the second clause of article 216 it is provided "that in all cases where, by any provision of this code, an oath of a party is required, it may *(in the absence of said party)* be made by his agent or attorney."

This oath may be made, in cases in the State courts, before the clerk of the court, or a notary.

In the United States courts all affidavits, when not made before the judge, or a justice of the peace or notary, must be made before a commissioner of the circuit court. R. S., sections 945, 1778.

The clerk of a State court is not authorized to take any affidavit to be used in a civil cause in the courts of the United States. Indeed, his authority is limited by the State statutes to cases in the State courts. He has no general power to take affidavits or administer oaths outside of his own court.

Two affidavits were annexed to the petition. One was made by N. H. Rightor, one of the plaintiffs, before James D. Rankin, a deputy clerk of the civil

district court for the parish of Orleans. The other was made by James L. Bradford, the plaintiffs' attorney, before T. V. Coupland, United States commissioner.

The first was void for want of authority in the deputy to administer the oath. The second was unauthorized, because the petition shows that at least twenty of the twenty-seven plaintiffs resided in the State, and the affidavit of the attorney does not aver that *any* of the plaintiffs were *absent.*

Such an affidavit does not warrant the issuance of a writ of sequestration. Hawley vs. Tarbe, 14 La. 92.

But if the affidavits can be held sufficient, the bond required by law was not given.

The article of the code above quoted requires the plaintiffs to give a bond—not one of them.

The bond in this case, however, neither purports to be given by all the plaintiffs, or on behalf of all. It is the single bond of N. H. Rightor.

The object of the law in requiring a bond from all the plaintiffs is manifest. As a general rule, a plaintiff is not liable to the defendant for the damage inflicted by judicial process, if he is defeated in his action, for in such case the maxim of the law is, *damnum absque injuria.* A plaintiff who loses his suit is never liable in damages, unless the defendant can show that it was not only prosecuted without cause, but maliciously.

The statute requiring the plaintiffs to give a bond, binding themselves to pay the damages which the defendant might suffer, was enacted for the express purpose of changing the general rule.

It is only by virtue of this bond that the plaintiffs can be held. The law provides that all shall be bound and held to answer the defendant's claim for damages, and it is not satisfied by the bond of one of them. It has been so expressly held by the Supreme Court of Louisiana. Goodin vs. Allen, 12 A. 448.

Sequestration, says the court in Wilson vs. Churchman, 4 A. 452, "is a harsh remedy, by which the property of a party is wrested from his possession, upon an *ex parte* proceeding; and the plaintiff must comply with all the requisites of the law, upon pain of nullity."

V.

If the court should hold that the validity of the Houmas grant is properly a question to be considered, we submit the case on that branch upon our brief in Alfred Slidell et als. vs. James G. Richardson, register, etc., No. 588, which has been argued at this term.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
Attorneys for Defendant in Error.

111-412

OFFICE SUPREME COURT U. S.
FILED
JAN 3 1884
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

SLIDELL, &c., APPELLANTS, &c., *vs.* GRANDJEAN.	No. 587.
SAME, APPELLANTS, &c., *vs.* RICHARDSON.	No. 588.
SAME, APPELLANTS, &c., *vs.* EMLER AND OTHERS.	No. 916.
SAME, PLAINTIFFS IN ERROR, *vs.* TSCHIRN.	No. 917.

BRIEF UPON BEHALF OF THE UNITED STATES FOR THE APPELLEE IN NO 587; THE SAME BEING (PARTLY) INTENDED ALSO AS OBSERVATIONS BY AN *AMICUS CURIÆ* UPON THE TITLE OF THE APPELLANTS AND PLAINTIFFS IN ERROR IN THE THREE OTHER CASES.

In the Supreme Court of the United States.

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SLIDELL, &c., APPELLANTS, &c., *vs.* GRANDJEAN.	No. 587.
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SAME, APPELLANTS, &c., *vs.* EMLER AND OTHERS.	No. 916.
SAME, PLAINTIFFS IN ERROR, *vs.* TSCHIRN.	No. 917.

BRIEF UPON BEHALF OF THE UNITED STATES FOR THE APPELLEE IN NO. 587; THE SAME BEING (PARTLY) INTENDED ALSO AS OBSERVATIONS BY AN *AMICUS CURIÆ* UPON THE TITLE OF THE APPELLANTS AND PLAINTIFFS IN ERROR IN THE THREE OTHER CASES.

The first three of the above cases are *suits in equity* for injunctions against trespassers upon lands alleged to be

included in a Spanish grant; the last is an *action at law* against a person who has cut timber upon such lands, the same still lying in the vicinity.

The plaintiffs claim such lands as *theirs*. Upon the other side, the trespasses complained of in No. 587 have been committed by a deputy surveyor of the United States (Grandjean) under direction of his superiors; those in No. 588, by a register of the State of Louisiana (Richardson), acting under color of his office; those in No. 916, by *forty* several trespassers claiming by private titles; and that in No. 917, by Tschirn, apparently a logger.

The question sought to be raised in each case is as to the title to the lands in question.

The plaintiffs allege that in the year 1777 these lands were granted to one Conway by the Spanish authorities; that such grant created a perfect title; or that if the title was imperfect it was reported upon favorably after the cession of Louisiana by the United States land commission of 1806; and many years subsequently was confirmed by the act of 1858. In this latter connection they admit that the latter act was formally *repealed* in 1860, but contend that the repeal could not affect their interests, which had already *vested* under the previous statute. Upon the whole, they claim a complete legal interest and title whether under the original grant or under the subsequent action by the United States as above.

Nos. 587 and 916 stand upon bill and general demurrer; No. 588, upon bill and answer, with certain *admissions* by counsel, &c.; and No. 917 upon petition and exceptions thereto (folio 30).

So far as the Government is concerned, every disposition exists to let the disposal of these cases by the court turn upon the merits, so that a long-standing contention may be authoritatively ended.

Certain preliminary objections, however, cannot be waived, as they substantially concern the standing of the plaintiffs as suitors, and suggest that the court in which three of these causes have been brought (*i. e.* a court of equity) is without jurisdiction to settle the main question.

In No 587 the objection goes farther; for it is submitted that the bill contains no allegation that the title of Conway, the grantee under Spain, has ever vested in the plaintiffs, or indeed that these are in *possession* of the lands; although, of course, no length of possession could affect the opposing title of the United States. (6 Peters, 666.)

In No. 588 also there is no such *allegation*, although there is an *admission* by counsel that such is the fact. (Folio 119.)

In No. 916, however, the bill alleges (pp. 23 and 28) that the Conway title had devolved upon the plaintiffs.

No. 917 corresponds in this circumstance with No. 587.

But in all three of these cases (in equity) the bills present to the court alleged legal estates and titles upon the part of the plaintiffs which have not been established at law, and for the establishment of which no suit at law has ever been brought, and which, besides, so far from being admitted in the present suits, are said in the bills to have been long disputed by the United States, and, indeed, to be attacked by the trespasses in question. In regard to such dispute of title in No. 587 the bill states (p. 9): "*That from that time* [17*th February*, 1829] *to the present time the United States have maintained, and from time to time asserted, by sales, pre-emption entries, grants to the State of Louisiana, and other hostile pretensions, the rights as proprietors under the treaty aforesaid* [*at Paris, the* 30*th of April*, 1803], *to all of the land within the Houmas grant as heretofore described lying behind and back of the line surveyed under the authority aforesaid, at the distance of* 42 *lineal arpents from the Mississippi River.*" This description covers the land now in dispute, and the statement as to the position of the United States towards the claim of the plaintiffs during the last fifty-five years is equally clear and candid.

The same or like language is used in No. 588, at page 9; and in No. 916, at page 13, bottom.

It is not necessary to call attention to other passages therein to the same purpose.

This circumstance seems to be fatal to the jurisdiction of a court of equity.

Adams, whilst discussing the topic of "injunctions against tort," says, "it is now settled that an injunction will lie for the protection of a title *admitted or proved at law*, whenever the act complained of is not a mere ouster or temporary trespass, but is attended with permanent results." (Equity, p. 210.)

This is a principle universally admitted, at least to the extent to which it is applicable here, viz: *that an injunction for such torts will not lie where the title is not admitted or has not been proved at law.*

I cite, also, the North Carolina Cases, Irwin *vs.* Davidson, 3 Ired. Eq., 311; Gause *vs.* Perkins, 3 Jones' Eq., 177; Lyerly *vs.* Wheeler, Busbee Eq., 267; 64 N. C., 356. The rule has been recently recognized in Root *vs.* Railway Co., 105 U. S., 189. That case arose upon the infringement of a patent right; but at page 213 the court, after quoting from the words of Mr. Justice Campbell in Hipp *vs.* Babin, 19 How., 271 (a case affecting land), as follows, "But in those cases the title must, if disputed, be established at law, or other grounds of jurisdiction must be shown," said, "These principles were announced in a case for the recovery of the possession of real estate held adversely, *but they are of general application*," &c.

A general and elementary principle underlying all such cases is, that a question as to the validity of a legal title must necessarily be a question of law, and not of equity.

Another objection to the case in No. 587 (and I believe in Nos. 588 and 916 as well), is that *no allegation of possession by the plaintiffs is made.* The relief prayed for being only an injunction it seems that at all events it should have been stated that the plaintiffs are in possession of the premises trespassed upon, or at least have brought a pending suit therefor. Not only is there (so far as I see) no allegation of such possession or action, but the whole state of the case seems to the contrary. So that the following language of Chief Justice RUFFIN, in Irwin *vs.* Davidson, 3 Ired. Eq., at page 318, seems pertinent here.

> *"What then is to be the effect of the decree in this suit? Either this court must, upon the hearing, try the legal title, and decree, upon the ground that this is in the plaintiffs, that the defendants surrender the possession to them, and thus turn this suit into an ejectment, strictly speaking; or the defendant* [*or those whom he represents*] *must be left in possession of the premises, without being decreed to do anything, but with an injunction upon him in the negative,—that he shall refrain from further operations on the land perpetually. Such a decree as the former has been often refused, for the court will not sustain a mere ejectment bill. And a decree of the latter kind we have never known to be even asked for. It would be inconsistent with first principles, for it would leave the plaintiffs still under the necessity of going to law to recover the possession, with lib-*

erty to the defendant, of course, to shew them that they had not the legal title; and the consequence might be that persons who turned out to have no rights themselves would have an injunction over another person, restraining him perpetually from all use of the property in his possession."

In this connection I submit that the passage quoted above, from page 9, of No. 587 (and said to be repeated in Nos. 588 and 916), attributes a course of dealing with the land to the United States, which is inconsistent with possession thereof by the plaintiffs at any time since 1829.

Like passages in the action at law (No. 917) have an important bearing upon that suit as well. For it seems that no connection in point of title betwixt Conway and the plaintiffs is alleged in that suit, so that in the absence of possession also no ground of suit exists for logs grown upon this land. Indeed, if there had been an allegation of title it would seem that the other statement in that case, that the land had been in adverse possession of others for fifty-five years before without explanation of the subsequent acquiescence of the plaintiffs, is such an ouster as must be fatal to an action for the produce of the land.

Supposing, however, that these preliminary objections shall be considered not fatal to these actions, or not so as to all of them, it will be necessary to examine the title set up by the plaintiffs.

They claim some 123,500 acres of land fronting upon the east bank of the Mississippi River, some 22 *leagues* above New Orleans, and running back to the River Amité and Lake Maurepas. The front of the tract is 22½ *arpents* in breadth, and the side lines thereof, *opening* from the Mississippi like a fan, are said to extend more than 351 and 455 *arpents*, respectively. Of this land it is conceded that the holders of the Conway interest are entitled to the front upon the Mississippi and 42 arpents in depth therefrom. The present controversy concerns only land lying back of the 42 arpents depth conceded; and this, it may be said, by the by, was granted by the United States in 1849 and 1850 to Louisiana as "swamp lands."

This part of the argument may well be prefaced by the following extract from an opinion of this court in reference to Spanish grants like the present:

> "The grants were not large, and fronted on the river only to the extent of from two to eight arpens as a general rule, and almost uniformly extended forty arpens back; to these front grants the Spanish Government reserved the back lands to another depth of forty arpens; and although few if any grants were made of back lands in favor of front proprietors, still, they were never granted by the Spanish Government to any other proprietor, but used for the purpose of obtaining fuel and for pasturage by the front owners, so that, for all practical purposes, they were the beneficial proprietors, subject to the policy of levees, and of guarded protection to front owners. We took possession of Lower Louisiana in 1804; in

1805 commissioners were appointed, according to an act of Congress, to report on the French and Spanish claims in that section of country, and by the act of April 21, 1806, it was made a part of their duty 'to inquire into the nature and extent of the claims which may arise from a right, or supposed right, to a double or additional concession on the back of grants or concessions heretofore made,' previous to the transfer of Government, 'and to make a special report thereon to the Secretary of the Treasury, which report shall be by him laid before Congress, at their next ensuing session, and the lands which may be embraced by such report shall not be otherwise disposed of, until a decision of Congress shall have been had thereon.'

"The commissioners were engaged nearly six years in the various and complicated duties imposed on them, and then reported that by the laws and usages of the Spanish Government no front proprietor by his own act could acquire a right to land farther back than the ordinary depth of forty arpens, and although that Government invariably refused to grant the second depth to any other than the front proprietor, yet nothing short of a grant or warrant of survey from the governor could confer a title or right to the land; wherefore they rejected claims for the second depth as not having passed as private property to the front proprietor under the stipulations of a treaty by which Louisiana was acquired." (Surgett *v.* Lapice, 8 How. pp. 66, 67.)

The claim of those in whom the title of Conway is now vested is said by them to be valid upon either of two grounds:

1. The action of the Spanish Government before the cession of Louisiana conveyed a perfect title, which afterwards required no action by the political department of the United States in order to be recognized and enforced in their courts; or,

2. Granting the Spanish title to have been imperfect,—after the cession of Louisiana it was favorably passed upon by the commission of 1806, and subsequently was confirmed by the act of 1858; *the act of* 1860, *purporting to repeal the latter, being a nullity because unconstitutional.*

Upon the contrary the Government claims:

1. That the Spanish title was not perfect; and

2. That the repealing act of 1860 interfered with a transaction *in fieri*, and therefore subject to the power of Congress.

1. The Spanish title to the grant was not perfect:

(*a*) A subsidiary remark in this connection is that upon the whole, the claimants thereunder have not so acted as if it were perfect.

The application to Governor Claiborne in 1803 for an official survey of the concession is to that effect. If the grant had been perfect this action was superfluous. The records show, however, that the claimants requested it as if a necessary element of title. This appears not only, *per se*, as it were, but also in the case stated by William Conway before the commissioners in 1806 where, as is obvious, reliance for the perfect title then set up is placed upon

Lafon's plat and survey of February, 1806. And even now that plat is relied upon by the learned counsel for the plaintiffs as rendering certain the otherwise uncertain award of those commissioners, whereas, as may be remarked in passing, the commissioners were required to pass upon evidence as it existed *before the cession;* and there is no evidence, and can be no presumption, that in fact they took anything else into consideration.

The above is a specific and material piece of evidence of the original character of this title as an *imperfect* one; but it may be confidently submitted that the whole attitude of the claimants for one hundred years towards so much of the grant as is not conceded by the United States to be perfect (viz, 42 arpents in depth from the river) has been that of persons who have *favors to ask* thereabouts, and not that of landowners naturally animated by the spirit of *defiance* which marks that class. The only apparent exception to this seems to be where their counsel have, by instructions, stated their case in pleadings as being "one of perfect title." Such pleadings, *under advice,* are not of the temper to which allusion is now made as wanting in those claimants. There is no defiance in such pleadings, except "for the purposes of the case" then in suit.

But this is a circumstance, although material, still of only secondary importance.

(*b.*) The Spanish grant is imperfect because the survey is imperfect.

Before the session the only description of the lands in controversy is that contained in Conway's application to

the governor. For these matters the resulting *survey* and *grant* refer to that *application*.

It is now submitted with confidence that *the side lines in that application are not fixed in length*.

1. The application does not ask for the land *covered by* the cypress forest. What was said to be needed was *contiguity* to the cypress swamp. Such, for instance, as under the laws of the province would give to the front owner a *timber privilege* for his plantation. *This boundary now is* and *ever since Claiborne's time has been disclaimed by the claimants*. The plats made out do not claim that line, *even in the alternative*, although a so much more definite statement as such *alternative* claim would have been, is said by the court in Clamorgan's case (101 U. S., 822) to be fatal.

2. However, it is to be said that the lands for which Maurice Conway applied were described by him as "vacant." Whether and how far any lands alleged by such applicants to be "vacant" were really so, was a matter the ascertainment of which was expected by the governors-general to be made by the survey. In the present case, therefore, it was not made by the Spanish authorities to any *depth* beyond the 2 arpents back of the purchase from the Indians; or, in other words, to any distance back of the 42 conceded to the Conway grant, and not now in controversy. It seems to be inadmissible that after cession a claimant of lands should be allowed for the first time to

suggest, as here, that this *vacancy* extended the circumference of his fan-shaped tract as far as the Spanish dominion, and put the United States to disprove that allegation!

(c.) The act of 1858 required, *ex industria*, a *train* of things to take place *in pais*, before the Louisiana titles therein provided for should be confirmed. In that respect it made a distinction between these and the *Missouri* titles, also therein provided for. Its first section passes upon the *Missouri* titles. These are specified by the names of their respective claimants, and appear to be confirmed by the act itself without more. The second section takes up the *Louisiana* titles—referring for their identification to certain pages of a book published many years before, containing decisions made by a commission fifty-two years before. A striking difference exists betwixt the statement of these titles and that of those in the first section *as regards certainty*. The first statement is much the more precise. It was reasonable therefore that in the third section of the act Congress should have proceeded to require as conditions precedent to a full confirmation of the latter titles certain additional requisites not needed for the former class. Accordingly, by such section, "the locations authorized by the *preceding* section" [an express distinction betwixt these and all others referred to in the act], were to require patents which the Commissioner of the Land Office was to issue [or not] after the exercise of official discretion upon certain matters submitted to him for consideration. This distinction betwixt the classes of titles above men-

tioned is emphasized in a subsequent clause of the same section, which, as regards another matter, changes the phrase above quoted into the comprehensive one "*all cases* of confirmation by this act," &c.

It follows that the repealing act of 1860, which went into effect upon the Louisiana titles before the administrative acts required by the statute as a condition precedent to confirmation had been accomplished, *i. e. re infecta*, was competent. The case is not one in which Congress has attempted to revoke an executed grant.

Langdeau *v.* Hanes (21 Wall., 521), cited by the learned counsel (brief p. 44) as being in regard to the point now in question, "singularly like the present case," differs from it in the essential particular that *there* the grant was complete before cession, or at all events affected a specific tract of land, whereas *here*, as has already been submitted, the grant before cession was imperfect (*the tract conveyed not being specific*), in consequence of which after cession the United States did succeed to "rights of property" in connection therewith, rights that necessitated a definition of boundaries by Congress, acting either directly or by special reference of the matter to the executive department.

The vice of uncertainty contained in Maurice Conway's original application and Governor Onzaga's decree for survey in 1776 is perpetuated through all the subsequent title papers, including the claim before the commission of 1806, the report of that commission, and the act of 1858, if regarded as a completed confirmation. For although the claim before the American commissioners (and their report as well) assigns certain lengths to the side lines of

the tract, *yet they also vouch therein the original Spanish papers relied upon as warranting those lengths; and necessarily so relied upon! Verba relata in esse videntur, so that it appears, as above submitted, upon the face of the claim of* 1806, *and also of the corresponding report, that the original application, decree, survey, and grant under the Spanish Government do not warrant the deduction drawn therefrom* (*after cession*) *as to the length of the side lines!* The act of 1858 operates upon the report of 1806, *read according to law;* and so read the original uncertainty of 1776, appears to have been in effect perpetuated even down to the statute itself.

The title under the Spanish Government was therefore, as said in Scull's case (98 U. S., p. 419), "inchoate;" *i. e.*, a right only as against the political department of the Government, *one existing neither "at law" nor "in equity,"* within the language and doctrine of Langdeau *vs.* Hanes.

S. F. PHILLIPS,
Solicitor-General.

APPENDIX.

ACT OF 1858.

CHAP. LXXXI.—An act to provide for the location of certain confirmed private land claims in the State of Missouri, and for other purposes.

Be it enacted, &c., That the decisions in favor of certain land claimants herein made by the recorder of land titles in the State of Missouri and the two commissioners associated with him by virtue of an act entitled "An act for the final adjustment of private land claims in Missouri," approved July nine, eighteen hundred and thirty-two, and an act supplemental thereto, approved second March, eighteen hundred and thirty-three, as entered in the transcript of decisions transmitted by the said recorder and commissioners to the Commissioner of the General Land Office, which said claims are named and numbered as follows: Manuel de Liza, number thirty-three [and twenty-four others by name], be, and the same are hereby, confirmed to the respective claimants or their legal representatives.

SEC. 2. *And be it further enacted*, That the decisions in favor of land claimants made by P. Grimes, Joshua Lewis, and Thomas B. Robertson, commissioners appointed to adjust private land claims in the eastern district of the Territory of Orleans, communicated to the House of Representatives by the Secretary of the Treasury, on the ninth day of January, one thousand eight hundred and twelve, and which *is* [are] found in the American State Papers, Public Lands (Duff Green's edition), volume two, from page two hundred and twenty-four to three hundred and sixty-seven, inclusive, be, and the same are hereby, con-

firmed, saving and reserving, however, to all adverse claimants the right to assert the validity of their claims in a court or courts of justice: *Provided, however,* That any claim so recommended for confirmation, but which may have been rejected, in whole or in part, by any subsequent board of commissioners, be, and the same is hereby, specially excepted from confirmation.

SEC. 3. *And be it further enacted,* That the locations authorized by the preceding section shall be entered with the register of the proper land-office, who shall, on application for that purpose, make out for such claimant, or his legal representatives (as the case may be), a certificate of location, which shall be transmitted to the Commissioner of the General Land Office; and if it shall appear to the satisfaction of the said commissioner that said certificate has been fairly obtained, according to the true intent and meaning of this act, then, and in that case, patents shall be issued for the land so located as in other cases; and for each and every certificate as aforesaid, issued by the register of any land-office, he shall receive the sum of one dollar; that in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre: *Provided,* That such location shall conform to legal divisions and subdivisions.

SEC. 4. *And be it further enacted*, That the register of the proper land office, upon the location of such certificate, shall issue to the person entitled thereto a certificate of entry, upon which, if it shall appear to the satisfaction of the Commissioner of the General Land-Office that such certificate has been fairly obtained, according to the true intent and meaning of this act, a patent shall issue as in other cases.

Approved, June 2, 1858.

RESOLUTION OF 1859.

(No. 13.) A RESOLUTION in relation to the second section of the act of Congress entitled "An act to provide for the location of certain confirmed private land claims in the State of Missouri and for other purposes."

Resolved &c., That the second section of the act of Congress, entitled "An act to provide for the location of certain confirmed private land claims in the State of Missouri and for other purposes," approved June second, eighteen hundred and fifty-eight, is hereby so suspended in its operation and effect until the end of the Thirty-sixth Congress as that no patent or patents shall be issued, nor shall any action be had by the executive branch or department of the Government, or any officer or agent thereof, under or by virtue of said section.

Approved, March 3, 1859.

ACT OF 1860.

Be it enacted, &c. That the second section of an act passed the second day of June, one thousand eight hun-

dred and fifty-eight, entitled "An act to provide for the location of certain confirmed private land claims in the State of Missouri, and for other purposes," and all other parts of said act which relate to lands in Louisiana, confirmed by said second section, (so far as said lands are concerned,) be, and the same are hereby, repealed.

SEC. 2. *And be it further enacted*, That Congress hereby refuses to confirm to the claimants under the Houmas grant the lands embraced in certificates number one hundred and twenty-five to William Conway, number one hundred and twenty-seven to Daniel Clark, and number one hundred and thirty-three to Donaldson and Scott.

Approved, June 21, 1860.

C.

CONVEYANCE TO MAURICE CONWAY BY HOUMAS INDIANS IN 1774.

Know all men by these presents that I, Calazare, chief, appointed by the governor of this province for the direction and command of the Indians Bayou Goula and Houma, in the best form according to law, and being informed of the right which belongs to me in this case, do hereby cede, renounce, and transfer unto Maurice Canoné and Alexander Latil, of this city, a tract of land measuring upwards of half a league, at the distance of twenty-two leagues from this city on this side of the river, joining on the upper side lands belonging to John the blacksmith, and on the lower side the place where are erected the huts in which the said two nations of Indians now live; but when the said huts will be taken away, to be transported on the other side of the river, the true boundary on the lower side will be the lands belonging to an old Acadian

named Peter, so by the measurement which the said purchasers will make of the said tract of land, according to the said boundaries, its exact contents will be ascertained. The said tract of land first belonged to a Frenchman called Blanpen, whose property, which comprehended the said tract of land, was sold at public auction, made by order of a competent magistrate, in consequence of certain crimes the owner thereof had perpetrated; at which sale another Frenchman by the name of Titon, and who has been the secretary of the governor about fifteen or twenty years ago, purchased the same, and possessed it for some time; after which the said tract of land was abandoned and remained vacant. In consequence of which, and with the permission of the governor in the time of the occupancy of this province by His Most Christian Majesty, I have possessed the same, fixing thereon the residence of the said two Indian nations, and all that the said tract of land comprehends, in the same manner as it was granted to me; in the name of the said Indians, I do grant, renounce, and transfer the same to the said Alexander Latil and Maurice Canoné, without excepting or reserving for me or for the said Indians anything, for the price of one hundred and fifty dollars, which they have paid to me in goods, at market prices, and of my satisfaction; and as the said payment is not actually made, I renounce the exception of the law *non numerate pecuniæ*, and I do declare that the just price and true value of the said tract of land are the said one hundred and fifty dollars, and that it is worth no more; and in case it should be worth anything more, whatever that may be, I make to the said purchasers and their heirs a gift, session, and donation thereof, in the best manner, irrevocably and *intervivos*, and from this day and forever I divest myself and the said Indians of all and every right which we had or could have to the said tract of land, and we grant, renounce, and transfer the whole, as aforesaid, to the said purchasers. That after obtaining the permis-

sion of the governor-general of this city and province they may possess it as absolute owners, and I bind myself and the said Indians not to contradict this cession on pretence, nor for any reason whatever. Whereas I and the said Indians are remunerated and satisfied with the aforesaid sum of one hundred and fifty dollars, and we, Alexander Latil and Maurice Canoné, being present at the passing of this instrument of writing, do accept in our favor the aforesaid cession made of the aforesaid tract of land for the price above mentioned of one hundred and fifty dollars, which we have paid down, and we bind ourselves to present the copy of this instrument to his excellency the governor that he may approve of it, without which formality we shall not be permitted to take any kind of possession of the said tract of land.

In testimony whereof the present was made at the city of New Orleans, on the fifth day of the month of October, in the year seventeen hundred and seventy-four. Thus the contracting parties whom I, the notary, do attest to be known to me, have agreed between them by means of John Baptiste Rousseve and Peter Larto, of this city, interpreters, and whom I do attest to be also known to me, in presence of Manuel Monteagudo, Peter Cowley, and Ferdinand Rogriguez, witnesses; and such of the contracting parties and interpreters as knew how to sign did sign, and for such as did not know one of the said witnesses did sign, all which I do attest.

JEAN BAPTISTE ROUSSEVE.
ALEXANDER LATIL.

As witnesses:
MANUEL MONTEAGUDO.
MAURICE CONWAY.

Before me.
ANDRES ALMONASTER Y. ROXAS,
Notary Public.

APPROBATION.

Having seen the sale made by the two nations mentioned in the foregoing instrument of writing, I do approve of it, and making use of the faculty of granting lands which the King was pleased to invest me with, I do grant the above mentioned one unto the purchasers, who will apply to me, in order that, in virtue of this sale and approbation, I may cause a complete title to be issued to them.

UNZAGA.

Lewis de Unzaga and Amezaga, brigadier of the royal armies, governor, intendant, and inspector-general of this province of Louisiana, &c.

In consequence of the above certified copy and approbation of the sale, that the chief named Calazare made, both in his name and in that of the Bayagoula and Houmas Indian Nations under his command, to Maurice Conway and Alexander Latil, of this city, of a tract of land, which was granted to them by the ancient French governor, measuring upwards of half a league in front on the river Mississippi, on the coast of Cabahanoce, in the district of Mr. Judice, joining on the upper side the plantation belonging to the blacksmith, and on the lower side that of an old Acadian named Peter; and there being no opposition made on the part of these two neighbors, and no injury being made to their respective boundary lines, using of the faculty that the king has given me, I grant in his royal name to the said Maurice Conway and Alexander Latil, the above-mentioned tract of land, which measures upwards of half a league in front on the aforesaid coast, with the common depth of forty arpens, joining on the upper side the plantation belonging to John the blacksmith, and on the lower side that of the old Acadian named Peter; that, as their own property, they may dis-

pose of or enjoy the same, conformably to the said sale and conditions imposed by the regulations concerning lands. I give the present, signed with my hand, sealed with my coat of arms, and countersigned by the underwritten secretary of this Government. New Orleans, November the first, in the year seventeen hundred and seventy-four.

LUIS DE UNZAGA Y AMEZAGA.

By mandate of his excellency,
JOSEPH FOUCHER.

APPLICATION OF MAURICE CONWAY, ORDER OF SURVEY, SURVEY AND GRANT OF 1776, '77, RECORD NO. 588, pp. 41, &c.

To the GOVERNOR GENERAL:

I, Maurice Conway, an inhabitant of this vicinity, with due respect, do represent to your excellency: That being about to settle myself up the country, on the lands which Alexander Latil and I purchased, with your approbation, of the Houmas Indians, and which are totally destitute of fences, and is cleared for upwards of one league in depth in such a manner that the cypress trees may be about one league and a half from the river without my having any right to them, your excellency having granted to us only the depth of forty arpents, with which shortness of depth I cannot have access to the cypress trees so necessary for the construction of my fences and other utilities of a plantation; therefore I humbly pray your excellency to take the circumstances into consideration, and to grant me all the depth which may be vacant behind or at the end of the aforesaid forty arpents of depth, whereof I am at present the sole owner, by virtue of a deed of conveyance

passed before Andrew Almonester, notary public, on the 4th day of January last, of the moiety belonging to Mr. Latil aforesaid.

I also pray your excellency to appoint Louis Andry to put me in possession of the aforesaid front and depth by fixing the needful boundaries and furnishing me with due copies of the whole transaction for my use and guide.

And in duty bound I shall ever pray.

MAURICE CONWAY.

NEW ORLEANS, *September* 27, 1776.

Louis Andry, second adjutant of this place, is hereby directed to go to the land alluded to in the within memorial, and to give petitioner possession of that which may be vacant after the forty arpents in depth, of which he is possession, following the same directions provided it be vacant, and that no injury is thereby done to any of the adjoining inhabitants; to which effect he shall establish his boundaries and limits, and of the whole proceedings he shall make a process verbal, of which he will make a return to us, signed by himself and the parties, in order to issue the complete title in due form to the claimant.

ONZAGA.

Louis Andry, captain of infantry and second adjutant, mayor of the city of New Orleans, duly commissioned and authorized by his excellency the governor-general of this province of Louisiana for the purpose mentioned in the above petition and decree, do certify that I have transferred myself on the 1st day of October, 1776, to the land referred to in the above documents, which land is situated in the district of the parish of the Ascension or La Fourche, on the left bank of the Mississippi, about twenty-two leagues above the said capital, being accompanied by the petitioner, Maurice Con-

way, and the commandant of the said district, Louis Judice, whom I requested (as being well versed in the language of the Houmas Indians), to send for their chief, named Calabe, seller of the land in question, in order that he might point out to me the boundaries which are to limit the same on both upper and lower sides, which being done, and the said chief present, he answered to me, through the assistance of the interpreter aforesaid, that the land sold by him, and formerly occupied by the Indians, extended from the lower line of Francis Duhon, on the upper side, to that of Michael Chiasson, on the lower (although these names do not correspond now with those which appear in the instrument of sale, because, since that time, the said adjoining lands have passed through the hands of several owners), and which intermediary land I then measured, drawing to this effect through the woods the necessary lines to ascertain its length (which lines are described in the figurative plat of my operations, which I delivered to the party), and found that it contains ninety-six arpents in front on the river, opening one hundred and twenty degrees toward its rear, owing to its situation in the bottom of the bend, the upper line adjoining lands of Francis Duhon, being directed north fifty degrees west, and the lower adjoining those of Michael Chiasson, running north seventy degrees east.

The measurement of the said front being concluded, I proceeded to put the petitioner in possession of the depth which, by the aforesaid decree, has been granted to him. To this end, having transferred myself to the upper line, which joins Francis Duhon aforesaid, I examined in his presence the stakes which had been planted by me on the 22d December, 1773, which stakes still exist in the same situation, distance, and direction, both of mulberry tree, the first measuring five feet, &c., planted at thirty-seven toises and two feet from the present margin of the river, and the second of 6 feet, &c., planted at one arpent, or 30 toises, farther back towards the rear.

Afterwards I proceeded on the same line and on the same course, viz, north fifty degrees west, until the forty arpents in depth, opening for that purpose a road through the woods, at which point I caused to be planted a stake of cypress of six feet in length, &c. And at two arpents farther still, that is to say, at forty-two arpents from the river, I planted another stake similar in all to the last-above described.

This line being concluded, I went to the lower one, adjoining lands of Michael Chiasson, whom I also sent for, and after having measured the seven arpents which, by decree of the 27th September of this same year, were granted to him by the same governor aforesaid, I caused to be planted on it two stakes of mulberry tree, the first measuring four feet, &c., at twenty toises from the present margin of the river, and the second at twenty toises farther back, after which I went on through the woods, and in the aforesaid direction of north seventy degrees east, on the same line, until the forty arpents in depth, at which point I caused to be planted a cypress stake six feet long, &c., and at two arpents farther from the river I caused another stake to be planted, that is, at 42 arpents from the river, of the same size as the precedent, in order to keep the course.

And for the end that all the above stated may be proven, I give the present certificate, signed by me, together with the party, Maurice Conway, and the commandant aforesaid, and interpreter in this case, the chief of the Indians having declared, as well as the two adjoining neighbors aforesaid, that they did not know how to sign, which I do attest in the above said court and district the day, month, and year above written.

LOUIS ANDRY.
MAURICE CONWAY.
LOUIS JUDICE.

GRANT BY GOVERNOR GALVEZ.

Don Bernard de Galvez, colonel of the battalion of infantry of Louisiana, governor, intendant, and inspector *pro tem.* of the troops thereof, &c., having seen the proceedings of the second adjutant of this town, Captain Louis Andry, relative to the possession by him given to Maurice Conway, pursuant to the above decree issued by my predecessor, of all the vacant land lying behind and on the rear of the first forty arpents which he possesses, by ninety-six arpents in front on the river, following the same direction of these, and finding them to be conformable to the rules of survey and agreeable to the concessions of the adjoining inhabitants, without causing to these last any harm or injury whatsoever, nor having by them been claimed, but, on the contrary, consented to it, as it appears by their assistance to the said operations:

Approving of the same, as we do by these presents approve, using of the power to us conferred by the king, we hereby do grant, in his royal name, to the said Maurice Conway the aforesaid land behind or at the end of the forty arpents which contain his plantation, situated in the district of La Fourche, by ninety-six in front on the river, following the same direction which those run, in order that, it being his property, he may share and dispose of the same, ruling himself upon the aforesaid proceedings, and observing the conditions prescribed in the ordinance relative to this subject.

Given under our hand and seal, at the city of New Orleans, and countersigned by our secretary, this 21st day of June, 1777.

BERNARDO DE GALVEZ.

By order of his excellency.

JOSEPH FOUCHER.

NOTICE OF THE CLAIM OF WILLIAM CONWAY TO THE COMMISSION OF 1806. (Record, No. 588, p. 113.)

William Conway claims a tract of land situated in the county aforesaid, at the place called Houmas, on the left bank of the Mississippi, containing twenty-two and a half arpents in front on said river, with an opening towards the rear of 60 degrees and 45 minutes, the upper line running N. 9 15 E., three hundred and fifty-one arpents, and the lower line directed N. 70 E., and measuring four hundred and fifty-five arpents. Bounded on the upper side by Dan'l Clark and on the lower by Simon Laneau, as more fully described in the annexed plat, executed by Bartholomew Lafon, deputy surveyor, dated Feb'y 20th, 1806.

Part of said land, that is to say, seventeen arpents front, were originally granted with a greater quantity by the Spanish Government to Maurice Conway, by virtue of a complete title issued on the 21st day of June, 1777, as per document No. 1, and the same conveyed to the claimant by the grantee aforesaid, on the 27th day of October, 1786, as per document No. 2.

And the five and a half arpents remaining to the compliment of the 22½ aforesaid were transferred to the claimant on the 27th day of March, 1781, by Pierre Part, who had purchased the same at the public sale made before Louis Jondico, commandant of the parish of La Fourche, of the estate of the late Joachin Mire (alias Belony), on the 7th day of December, 1878, "as it evidently appears by the authenticated document hereunto annexed, No. 3."

It is to be observed that although the deed of conveyance of Maurice Conway aforesaid contains 27 arpents front the claimant only possesses seventeen, having disposed of the other ten in favor of Daniel Clark.

WILL'M CONWAY.

SURVEY BY LAFON, UNDER THE ORDERS OF GOVERNOR CLAIBORNE. (Record No. 588, p. 114.)

At New Orleans, the 20th of the month of February, 1806, and the 30th of the Independence of the United States.

I, the undersigned, Bartheleme Lefon, a surveyor deputized by Isaac Briggs, surveyor-general of the lands south of Tennessee, certify the present plan conformable to the surveys executed by Mr. Andry, surveyor, in the month of March, 1804, and to those which I made of the river Amite in December of the year 1803, by which there results in favor of Mr. William Conway a piece of land of 27 arpents front on the right bank of the Mississippi, in the quarter of the Houmas, at 22″ distance from New Orleans, limited by two lines, of which the upper one runs N. 9 degrees 15′ E., having three hundred and fifty-one arpents of depth and extending to the river Amite, ¼ of a mile below Grais Creek, the second lower one running N. seventy degrees E. of the compass, in the year 1776, and that of 67° E., of the present year, having in depth four hundred and fifty-five arpents and terminating at Lake Murepas; bounded on the south by the Mississippi, on the west by Daniel Clark, on the north by the Amite River, and on the east by Simon Lanceau.

Having asked to see the titles which certify to the ownership, various documents were presented to me, by which it proves that Mrs. Latille McNemara and Maurice Conway bought from the Houmas savages an extent of ground containing 96 arpents; that Maurice Conway bought of Latille and Bartheleme McNamara, the 4th of January, 1776, the portion of land which they had in their part; that Maurice Conway obtained by concession the 22d of June, 1777, from the Counte of Galvez, then governor in this province, all the back part of his plantation that was vacant, following the lines which then formed his plantation, which ran, the one N. 50″ W., the other N. 70″ E.; that the 27th October, 1786, W. Con-

way bought from his uncle, Maurice Conway, a portion of land, A, B, C, E, of about 27 arpents front, with the depth conformably to the titles that had been given him the 22d June, 1777; that Maurice Conway sold to Oliver Pollock a portion of his land, E, F, L, K, which belonged successively to Dr. Anderson, whose succession sold it to Belony Meer, and which, he being dead, five arpents and a half of this land, E, F, I, K, were bought by his testamentary executor, Pierre Part, and that at last Pierre Part gave these five arpents and a half of front by forty of depth to William Conway in exchange for another tract of land of 20 arpents on the other bank of the river, by an act before the commandant of La Fourche, dated 7th December, 1788, so that William Conway found himself possessor, in the year 1804, of a front, A, I, of 32 arpents and a half, of which he sold ten arpents, A, B, C, D, in 1805, to Mr. D. Clark. By this sale there would remain to Mr. Conway but 22 arpents and a half of front, D, C, N, H, I, but the partial surveys that were made precedently by his uncle and the accretions having augmented the total front, which lies in a bend, his uncle having sold to him with the condition, more or less, and having bounded it by the neighbors, Patrice, Conway, and Anderson, the four arpents and a half of surplus belongs to him by right.

Moreover, William Conway having bought but forty arpents depth from Pierre Part, E, F, H, I, and Maurice Conway having reserved the back portions, F, G, L, M, W. Conway claims these same back portions of the five arpents and a half, and those of ten arpents, H, L, M, N, as being the heir of his uncle. Thus it appears by the above plan that William Conway possesses an irregular surface of ground, D, C, G, M, L, H, F, E, bounded as specified above.

In faith whereof I have given the present plan and process verbal the same day and year as above.

LAFON,
Deputy Surveyor.

DECISION OF THE COMMISSIONERS OF 1806. (Record, No. 588, p. 150.)

No. 125. William Conway claims a tract of land situate in the county of Acadia, at the place called the Houmas, on the left bank of the Mississippi, containing twenty-two and half arpents in front, with an opening towards the rear of sixty degrees forty-five minutes, the upper line running north nine degrees fifteen minutes east three hundred and fifty-one arpents, and on the lower line directed north seventy degrees east, and measuring four hundred and fifty-five arpents; bounded on the upper side by Daniel Clark's land, and on the lower by land of Simon Laveau.

It appearing to the board, from a patent or complete title exhibited, that seventeen arpents of front were, together with a greater quantity, granted by the Spanish *garnishment* [Government] to Maurice Conway 21st June, 1777; and it appearing that the five and a half arpents of front remaining of the land aforesaid were purchased by Pierre Part at the public sale of the estate of the late Joachine Mire, alias Belony, on the 7th day of December, 1788; and it further appearing to the board from the several instruments of conveyance offered in testimony that the two tracts of land aforesaid have been conveyed to the present claimant, the board do hereby confirm his claim aforesaid. (No. 588, p. 150.)

IN THE SENATE OF THE UNITED STATES.

March 23, 1860. Ordered to be printed.

REPORT.

(To accompany bill S. 307.)

The select committee to whom was referred the memorial of residents and owners of lands in the parishes of Ascension and Iberville, Louisiana, praying the repeal of the "Act to provide for the location of certain confirmed private land claims in the State of Missouri, and for other purposes;" to whom, also, was referred the protest of the owners of Houmas grant, have had the same under consideration, and report:

That it appears that on the 5th of October, 1774, one Maurice Conway and Alexander Latil purchased of the Bayou Golau and Houmas Indians a tract of land measuring upwards of half a league in front, on the river Mississippi, about seventy-five miles above the city of New Orleans.

This purchase, it appears, was approved by Unzaga, the governor of Louisiana, to that extent, and *with the common depth of forty arpents.*

The front is bounded on the river, at a common depth of forty arpents in the rear, and the side lines were described by the adjoining tracts.

Afterwards, on the 9th of September, 1776, Maurice Conway petitioned Governor Unzaga for an additional grant in the rear. Omitting the formal parts, that petition sets forth as follows:

"That your petitioner, intending to go and establish himself in the upper part of the country, on the land which he has purchased jointly with Alexander Latil, and with your permission, from the Houmas Indians, which land is extremely deficient of fences, and is cleared out upwards of a league in depth, so that the cypress swamp being at a distance of about one league and a half from the river, your

petitioner has no right thereto, in consequence of your not having granted to him but the common depth of forty arpents, which is so short that he cannot reach the cypress trees necessary for making fences and other work absolutely necessary on a plantation; therefore your petitioner prays you will grant him all the depth which may be vacant immediately after the said depth of forty arpents."

The said Conway further avers that he was the sole proprietor, having purchased the moiety which belonged to Latil, and prays that Unzaga "will direct Louis Andry to put your petitioner in possession of the said front and depth, setting the boundaries and giving to your petitioner a certificate of the whole for his information and security."

In pursuance of this petition, Unzaga, on the 27th September, 1776, made his order that "Capt. Louis Andry shall go on the land mentioned in the foregoing petition, and shall put the petitioner in the possession of the land which may there be vacant on the back of the forty arpents of depth which he possesses, and running in the same directions, provided the same be vacant and do not injure the neighbors, to the effect of which *he shall set and mark the boundaries, and shall extend after this decree a proces verbal of his operations*, which, signed by him and the said neighbors, shall be forwarded to me, that I may cause the complete title to issue."

It further appears that, on the 9th day of October, 1776, Captain Andry made the survey, and certified that he went on the land alluded to, accompanied by Conway and the commandant of the district, Louis Judice, and after having called on the Indian chief to designate the boundaries of his sale, his *proces verbal* then proceeds as follows: "And immediately after I have measured the space between those boundaries, drawing to that effect in the woods the lines necessary to ascertain its extent (which lines are marked on the plan, a sketch of my operations which I have delivered to said petitioner), and found

that it contains ninety-six arpents in front on the river, growing wider one hundred and twenty degrees in depth, on account of its being situated on the bend of the river, the upper line common with Francis Duhan, running north fifty degrees to the west, and the lower one common with Michel Chiasson, running north seventy degrees to the east.

"The measurement of said front being thus made, I proceeded to put the petitioner in the possession of the depth granted to him by the foregoing decree, to the effect of which I went back to the upper line common with Francis Duhan, in whose presence I found out the boundaries set by me on the 22d of December, 1773, and which still exist in the same situation, distance, and direction, both of mulberry wood—the first * * * at the distance of thirty-seven toises and two feet from the actual bank of the river, and the second * * * at one arpent or thirty toises more in the back. Afterwards I continued in the same line, and in the aforesaid direction, of north fifty degrees west to the depth of forty arpents, opening to that effect a small road through the woods, at which place I caused to be driven two feet and a half in the earth a boundary of cypress wood * * * at the further distance of two arpents—that is, at forty-two arpents from the river—another boundary similar in all its circumstances to the one just spoken of. This line being thus drawn, I went to the lower one common with Michel Chiasson, whom I also called, and after measuring the seven arpents, which, by the decree of the 27th of September last, the governor aforesaid granted to him, I caused two boundaries of mulberry wood to be driven in the said line, the first * * at the distance of twenty toises more in the depth. After that I continued the said line through the wood in the same direction of north seventy degrees east to the depth of forty arpents, at which point I caused to be driven two and a half feet in the earth a boundary of cypress, * * * and at the further dis-

tance of two other arpents—that is, at the distance of forty-two arpents—from the river I caused another boundary of the same size and similar in all its circumstances to the foregoing to be driven into the earth in order that the direction may not deviate.

"And in order that all the above may appear, I give the present certificate, which I have signed, with the said petition of Maurice Conway, and the said commandant and interpreter of this transaction, Louis Judice, the said Indian chief named Calabe, and the two adjoining neighbors, Francis Duhan and Michel Chiasson, having declared not to know how to sign. All which I do attest at the aforesaid coast or district the day and year above written."

The proces verbal is accordingly signed by Andry, Conway, and Judice.

On the 21st June, 1777, Galvez, the then governor of Louisiana, made the grant, which is in the following terms:

"Bernardo de Galvez, colonel of the battalion of infantry of Louisiana, governor, intendant, and inspector-general thereof, having seen the foregoing proceedings of the second adjutant of this place, the Captain Lewis Andry, concerning the possession which he has given to Maurice Conway by virtue of the foregoing decree, issued by my predecessor, of all the vacant land, behind or in the rear of the forty-first arpents, which he possesses, by ninety-six arpents in front, on the river, running in the same direction as these; and whereas the same is conformable to the rules made touching surveying of land and adjoining neighbors, so that no injury is done to said neighbors, who, so far from having made any opposition, have consented to said operations, of which I do hereby approve, and, using the faculty that the King has given me, I grant, in his royal name, to the said Maurice Conway the said land behind or in the rear of the forty arpents which are contained in his plantation, situated in the district of La Fourche, by ninety-six in the front in the river, following the same direction as those, in order that, as his own prop-

erty, he may dispose or enjoy the same comformably to the said operations, and complying with the conditions prescribed in the ordinances made on the subject of lands."

It does not appear that any of these original papers referred to are in existence or were ever recorded, but assuming them to be genuine, they constitute the whole of the title of the claimant under the Houmas grant under the Spanish grant.

It does not appear that the fact of the grant has ever been contested by this Government. The whole question has been as to its extent.

The first account we have of this claim under this Government was an application made by the claimant, about the year 1804, to Governor Claiborne, of Louisiana, to have the same surveyed, and in pursuance of an order from him one Bartholomew Lafon was appointed to survey the same.

Lafon's survey ran out the northwest line to Bayou Manchac, and the northeastern line to Lake Maurepas, including all the lands included in these boundaries out to the Manchac and Amite Rivers, which was there the boundary on the east of the possessions of the Spanish crown.

This survey, with the perfect Spanish grant upon which it was reputed to be founded, was laid before the board of commissioners organized under the act of March 2, 1805, for the purpose of ascertaining and adjusting the titles and claims to lands within the Territory of Orleans and the district of Louisiana. It had then been parceled into three distinct tracts, one held by Donaldson and Scott, another by Daniel Clarke, and the third by William Conway, all claiming title by purchase or succession from Maurice Conway.

The two commissioners who composed the board at the time the claims and the evidence to support them were presented decided that "the claimants had fully established their right, that their title was a genuine and complete

Spanish grant, and that it included all the land claimed by them and included in Lafon's survey. These decisions appear under the numbers 125, 127, and 133 in the transcript of their decisions laid before Congress by the Secretary of the Treasury on the 8th day of January, 1812. Thomas B. Robertson, who became a member of the board subsequently to its action on these claims, entered a formal dissent from these decisions. According to the laws establishing this commission these decisions of the commissioners were to be reported to Congress for its final action and decision thereon.

That the claimants under the Houmas grant were entitled to ninety-six arpents front on the Mississippi River, and the *common* depth of forty arpents rear, seems to have been conceded by all of the agents and officers of the Government, and that they were entitled to a back concession to some extent seems also to have been generally admitted. The whole controversy rests upon the extent of the back concession. No officer or agent of the Government, except two of the commissioners, appointed under the act of 1805, ever acknowledged the grant to the extent claimed. We may except also Judge Bibb, who, when Secretary of the Treasury, held that under the act of 1814 Congress had confirmed it to the whole extent claimed. This decision of Governor Bibb was subsequently reversed by the circuit court of the United States, and from which decision the claimants under the Houmas grant have not appealed.

With these exceptions the whole action of the Government, from the day of the treaty of 1803 up to the act of the 2d June, 1858, now under consideration, has been against the claim to the extent urged by the persons claiming under this grant.

The grant of the 21st June, 1777, from Governor Galvez to Maurice Conway contains the whole claim to the premises in dispute. It never was petitioned for, surveyed, or granted, otherwise than hereinbefore stated. It was a complete grant to all it conveyed, and the sole ques-

tion in controversy, admitting the grant to be genuine, is how much it embraced. To that extent the Government of the United States is bound both by the law of nations and the treaty of 1803, by which we acquired the title of France to Louisiana. It required no further acknowledgment, no act of Congress, no confirmation of commissioners, to the perfection of the right of those who claimed under it. The Government of the United States covenanted, so far as concerns this controversy, to do nothing except to preserve the rights of property of those persons who owned property in Louisiana. The Government of the United States performed all of its treaty stipulations with France with fidelity and honor. It not only respected perfect rights of property, but, with a wise liberality, it undertook to carry out with reference to the people of the ceded province all of the undertakings, perfect or imperfect, of both the Governments of France and Spain, the former proprietors of Louisiana.

The act of 1805 *required* all persons claiming under incomplete titles, and *permitted* all persons having *complete* titles, to present them within a limited time to commissioners appointed under that act, whose duty it was to examine them and report their decisions thereon to Congress. Their decisions were not final; they were subject to the determination of Congress thereon.

The act of 1806 still further aided honest claimants under the French and Spanish Governments.

The act of 1807 vested in the commissioners the power finally to determine upon all cases which involved no more than the quantity of land contained in one league square; and the act of 1814 authorized the issuance of patents to all persons coming within the act of 1807.

The claimants under the Houmas grant come within none of these acts of Congress. It has been before remarked that they sought to bring themselves under this act of 1814. This pretension, after having been allowed by Governor Bibb, was condemned by the circuit court of

the United States. Efforts were made at different times to get a recognition of this grant to the extent claimed by its owners, both from Congress and the different departments of the Government, from 1805 to 1858; but all these efforts failed. A very full and accurate history of these efforts, and of this claim generally, is to be found in an opinion of Mr. Justice Clifford, now of the Supreme Court, then Attorney-General of the United States, given to the President in pursuance of a resolution of Congress passed the 26th of June, 1846, to which your committee beg leave to refer the Senate, in order to avoid its repetition here.

The difficulty, as before observed, in this grant is this: the back line of the survey never was closed. The surveyor ran but two arpents back of the first forty arpents "to keep the course." How far the two lines from the river were to run was not specified. The petitioner wanted a timber privilege for less than 4,000 acres of land; represented that he had no timber for fences and other necessary plantation purposes; said that the cypress was one and a half leagues back of the river, and it seems asked for a concession of *all the back lands* to get timber for his farm.

Under the term, "all the back lands," the Houmas claimants *after* the treaty of cession, and *never* before, claimed and surveyed above 180,000 acres of land for a timber privilege for less than 4,000 acres. This timber was scattered over more than 300 square miles in a country not naturally well adapted to easy transportation.

This pretension was very naturally considered exorbitant and unreasonable, and nothing but the clearest words of grant, unrestrained by the facts and circumstances of the case, could be deemed sufficient to maintain it. Therefore the officers of the Government and Congress uniformly, with the exception before stated, refused to recognize it.

The claimants under the Houmas grant have been in possession of the river front from 1777 to this time, anp the extent of this possession to the rear does not appear to the committee; but in 1776 the King of Spain imported from the Canary Islands a company of poor immigrants and settled them on the Iberville and Amite Rivers, twenty or thirty miles from the river Mississippi, granted them lands, and established the town of Galveston, all within the limits of said grant as now claimed.

Some grants upon the Mississippi River were made before this, and with which this Houmas grant conflicts, and others were made after this grant within the limits as now claimed, without objection or complaint from these grantees, as far as your committee have been able to ascertain.

Other persons, squatters, without legal rights, have also, from time to time, settled on these back lands, relying upon the uniform policy of the Government to grant them pre-emption if the lands should prove to belong to the Government and not to the claimants. All these settlers in the aggregate, according to the memorial before your committee, amount to about five hundred families. Some of these occupants have located on their premises in pursuance of Spanish or French grants older than the Houmas grant, others under grants younger than that grant, and others still relying solely upon the goodness of the title of this Government; and it is a strong fact in this case that from 1803 to this hour, as far as your committee have been able to learn, no effort has been made to eject any of these persons by the Houmas grantees.

We have already shown that the title of the grantees was perfect to every extent that they had title at all—just as perfect without as with Congressional action, *if it were a good title*—yet they seem never to have ventured to assert it in the courts, even against a squatter.

Your committee do not deem it necessary to give any opinion as to the validity of the Houmas grant or its ex-

tent, further than to say that it is not, in their judgment, such a title as Congress ought to affirm, to the prejudice of the other parties at interest, without a judicial affirmance of it.

The act of the 2d June, 1859, gives a great and unjust advantage to the claimants, for which your committee see no sound reason either in justice or sound policy. It gives the Houmas grantees paramount title to the lands in dispute, and requires all adverse claimants to make good their titles by suits at law; and if they fail, for any reason whatever, to show a perfect title in themselves, their lands all fall to the Houmas grantees. This is manifestly unjust to such adverse claimants, and may inflict the most cruel wrongs upon them. But this bill is also unjust to the public. If the Houmas grantees have no good title to this vast body of lands, it is against sound principle and sound policy to give it to them. By the third section of said act, if any of these grantees within the lines of the Houmas grant should be able to maintain their titles, this section allows the Houmas grantees to float on the public lands for such deficiency. Therefore, if any portion of their grant shall be defeated, even by a better and superior title, though it may be derived from Spain or France, this act makes up the loss to the claimants under the Houmas grant from the public domain. This legislation, also, we think unsound and untenable. Your committee therefore recommend that the second section of the act of 2d June, 1858, and also so much of the third section as refers to the second, be repealed, and that the title of the claimants under the Houmas grant be judicially settled; and for which purposes they herewith report a bill.

O

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

SLIDELL ET AL.S., *Appellants*, *vs.* GEO. H. GRANDJEAN.	No. 587.
SAME, *Appellants*, *vs.* JAS. G. RICHARDSON, &c.	No. 588.
SAME, *Appellants*, *vs.* EMLER and others.	No. 916.
SAME, *Plaintiffs in Error*, *vs.* TSCHIRN.	No. 917.

The verbal criticisms of the learned counsel for the Government on the bills in Nos. 587, 588, and 916, and the declaration in No. 917, predicating thereon failure to set forth the possession and title in plaintiffs according to the strict rules of pleading, result doubtless from the haste with which his brief was necessarily prepared and the number and length of the bills, &c. An inspection of them must show the objections are not well taken. They state not only the case of the plaintiffs, but of the Government also, with a fulness and candor amounting to, or verging on, prolixity. Indeed our admission of hostile acts and pretensions by government officers as to part of the lands are distorted into confessions throwing us out of a court of equity. But an

attentive reading of the following portions of the bills, &c., will vindicate them against the vices alleged:

In No. 587, pp. 3, 4, 5, 6, 16, 17, 18, and 19:

In No. 588, pp. 3, 4, 17, 20, 21, 22, 23, 24, and 39.

On the 2d page of his brief the Solicitor General states the bill in No. 916 is against "*forty* several trespassers claiming by *private titles*," whereas the bill, met by general demurrer, alleges on p. 31 the amplest ancient possession and title of plaintiffs, and on pp. 23 and 24 that all the defendants are mere trespassers engaged in continued and destructive spoliation, without an implication even that they had or claimed title.

On p. 23 it is said "that in addition to the said persons who are cutting and removing and destroying said timber, and who have squatted on said land, and live mostly in camps, shanties, and huts, built on the banks of the bayous, and streams which intersect said claim," &c., &c. They demur, and therefore admit these allegations, and preclude us from sustaining them by proof. At the bottom of p. 28 it is also avered, "And your orators further show that they are the only true and lawful owners, under titles derived from Wm. Conway, of all the lands in said Wm. Conway division of said Houmas grant, and that the back or rear lands in said division, being the low swamp lands upon which the defendants are committing their acts of trespass and spoliation, are held by your orators in a state of indivision: * * * but they will at all times hold themselves ready to file and exhibit a complete chain of title from said Wm. Conway to themselves," &c. On p. 32 the trespassers, described by the Solicitor General as in *possession under title*, are further described as "mostly poor people, with no property but their camps and huts, against whom judgments in ejectment could not be executed and judgments for damages could not be collected."

In No. 588 the admission by defendants on p. 39 of the record cures every defect in the bill: "That whatever right, title, claim, or interest William Conway had, or could have had, in any lands in his said claim under the Spanish grant to Maurice Conway of the 21st June, 1777, or the alleged confirmation by the 2d section of the act of Congress of June 2d, 1858, it is admitted the complainants have and are entitled to under derivative titles deduced from him."

The bill in this case described the defendant (p. 2 at the bottom) as "the Register of the State land office for said State, which office is situated and exercised in said city," (meaning New Orleans.)

In No. 587, against the surveyor, it is said, p. 17, "that the said Geo. H. Grandjean * * is now actually engaged, with a numerous company of chain-carriers, flagmen, and axmen, and other assistants, in surveying the same, &c., * * and for this pur-

pose *he has entered upon, with his said assistants*, and is now encamped upon the said lands of your orators," &c., &c.

These extracts will serve to show how unjust the criticisms on our pleadings are. But if they were just as to our possession, the consequences contended for would by no means follow, except, perhaps, in the sequestration suit No. 917, for the recovery of the timber found in the possession of Tschirn.

The elementary principles cited from the equity writers by the learned counsel have no application to the remarkable facts of these cases. We will not dispute them, but only answer his references to the adjudged cases in this court.

In Hipp vs. Babin, (19 How., 271,) the bill was brought to obtain a decree on title to lands, and for an account of rents, profits, and receipts, during a period of occupancy by defendants for upwards of fifty years. One or two passages from the opinion pronounced by Justice Campbell will show how totally inapplicable it is to any of the four cases at bar. "The defendants claim by their answers as *bona fide* purchasers from persons deriving their title by valid conveyances from Daniel Clark, and affirm that the family of Fletcher left the United States in 1807. * * *That the lands have become valuable by their improvements, and that they and the persons under whom they claim have held the possession since* 1806. * * The bill in this cause is, in substance and legal effect, an ejectment bill. The title appears by the bill to be merely legal. The evidence to support it appears from documents accessible to either party, *and no particular circumstances are stated, showing the necessity of the courts interfering, either for preventing suits or other vexation, or for preventing an injustice*, irremediable at law," &c. The only extract given by the Solicitor General (p. 5 of this brief) is calculated to mislead rather than to guide the court. It is this, from p. 279: "But in those cases the title must, if disputed, be established at law, or other grounds of jurisdiction must be shown." The words which *preceded* this sentence show what *cases* the court had in view: "There are precedents in which the right of an infant to treat a person who enters upon his estate with notice of his title, as a guardian or bailiff, and to exact an account in equity for the profits, for the whole period of his occupancy, is recognized. (Bloomfield vs. Eyre, 8 Beav., 250; Van Epps. vs. Van Deusen, 4 Paige, 64.) *But in those the title must, if disputed, be established at law, or other grounds of jurisdiction must be shown.*" The whole sentence is repeated in Root vs. Railway Co., cited by the Solicitor General, (105 U. S., p. 212.) But neither case has any analogy to the cases at bar. The State Register is not and never has been in possession. The surveyor, a mere contractor under the Surveyor General, and not an officer of the Government, (Hall vs. Wisconsin, 13 Otto, p. 8,) is only alleged to have gone upon and camped on the land with

his assistants. The depredators, as we have shown, are described as also camped and squatted on the land for the mere purpose of removing the timber and wood, and the logger, Tschirn, is only said to be in possession of certain logs cut upon and in process of removal from the lands. The relief prayed is against acts of trespass, not casual, but continued, inevitably tending to the total and irremediable destruction of the estate in such lands. It is too plain there is no other relief which can be called "plain, adequate, and complete." The jurisdiction arises under sec. 1 of the act of March 3d, 1875, (18th Stats., 470;) see construction of this act in R. R. Co. vs. Mississippi, (102 U. S., 135; Removal Cases, (10 Otto., 475;) Pacific R. R. vs. Ketchum, (11th Otto, 298;) Whilsitt vs. R. R. Co., (13 Otto, 770.)

The injunctions asked are supported by the following cases: Osborn vs. The Bank, (9 Wheat., 856;) Board of Liquidation vs. McComb, (2 Otto, 541;) and especially *Davis vs. Gray*, (16 *Wal.*, 203.) These are referred to at length on p. 70 of our other brief. We will repeat two passages from the last, p. 219: "*Here the property in question is not in the possession of the defendants.* The possession of the receiver has not been invaded. *He has not been in possession, is not seeking possession, and there is no question in the case relating to that subject.*" P. 232: "A case more imperatively demanding the exercise of jurisdiction in equity could hardly be imagined than that presented in this bill. Should the interposition invoked be refused, doubtless the reservation would speedily be thatched over with adverse claims. * * The injury would be irreparable. It is the peculiar function of a court of equity in a case like this to avert such results."

It is urged our relief is not in equity but at law in ejectment against the defendants in the three equity cases. But they are not in possession and do not dispute the *facts* founding our rights, and what could a jury decide but such facts, leaving the court to pronounce judgment thereon? May not the chancellor do the same? Besides, our right is already established by the treaty of 1803, the decision of a special tribunal of exclusive original jurisdiction, and the confirmation by an act of Congress, or if not, a court of equity is as competent to see where the right is as the judge at law. (Hilliard on Injunction, chap. 28, sec. 1; Hilliard on Injunction, chap. 1, secs. 23, 31, 37, 39; 2 Daniel's Ch. Prac., 1629, &c.; High on Injunctions, secs. 458, 469, 470.) The truth is, no sort of remedy at law exists at all. It is vain to enquire if it be convenient, adequate, or complete. There is none of any kind. It is a stronger case than Davis vs. Gray, or Osborn vs. The Bank, or Board of Liquidation vs. McComb. The bill and demurrer in the case against the surveyor and the bill, answer, and admissions in the case against the State register exhibit most extraordinary grounds for injunc-

tive relief. If the treaty, or the decision of the commissioners, or the confirmation by Congress, or all together give us title or protect it, it is too plain the acts sought to be restrained necessarily tending to the utter annihilation thereof, must be enjoined. Equity can try these pure questions of law as well as the judge. All depends on them and them alone.

On pp. 8 and 9 the learned counsel for the Government copies a long extract from the opinion in Surgett vs. Lapice. (8 How., 48.) But the case has no sort of application, as it arose under what are called the "back pre-emption" acts of Congress, (sec. 5, act of 21 April, 1806, 2 Stats, 391; sec. 5, act of March 3, 1811, 2 Stats., 262; sec. 7, act of May 11, 1820, 3 Stats., 573; sec. 1, act 28 Feb'y, 1823, 3 Stats., 729; and sec. 1, act of June 15, 1832, 4 Stats., 534, &c.,) which gave to front proprietors having only 40 arpens in depth a privilege to purchase, under certain restrictions, the lands in rear and adjacent.

It seems to be confidently assumed that because the side lines of the grant of 1777 were only run and marked on the ground the distance of two arpens (about 130 yards) that the grant was valid as a perfect grant only to that depth, and for the residue it was inchoate. To minds familiar with the accurate system of surveys founding grants by the American colonies, the States, and more particularly the United States, in which quantity is always expressed and all lines invariably run on the ground, enclosing the whole tract conveyed, the loose systems of France and Spain in lower Louisiana appear incomprehensible. The result has been that in many cases before this court, involving large grants in Florida, Louisiana, and California, their validity has been strongly contested on no other grounds than that their surveys and descriptions would not support them under the rules and principles of the common law. But this court has often reproved this tendency, perhaps inate in minds educated under different systems, and at least in the following cases has refused to sanction it: United States vs. Arredondo, (6 Peters, 691,) in which a complete Spanish grant for a tract of 289,645.70 acres, to be laid off subsequently, was confirmed without precedent survey by any authority, only a figurative plot accompanying the grants which required the land to be "four leagues to every wind in a rectilineal figure." (P. 693.) Here was a patent by Spain without survey. It proceeded upon the doctrine founding all their grants or nearly all, *id certum est quod certum ridi potest.* In U. S. vs. Perchman (7 Peters, 82) the patent by Spain for 2,000 acres, dated December 12, 1815, (p. 54,) merely described the land by reference to the very general words of the petition, the order for survey not following until 31st December, 1815, and the actual survey only made on the 20th August, 1819.

In United States vs. Clarke (8 Peters, 436) a formal Spanish

patent was granted April 6, 1816, (p. 442) for five miles square or 16,000 acres, described as "a competent tract of the west side of St. John's River, above Black Creek, at a place called White Spring, that is vacant."

It was not surveyed until the 24th January, 1819, and then only for 8,000 acres in the proper place, (p. 468, where it is erroneously stated 1817,) but was confirmed for the whole 16,000 acres because the *severance was effected by the grant.* At the foot of p. 466 the court shows the applicant and governor both knew so little of the depth asked for that three years later permission was given to survey the other 8,000 elsewhere, because if taken in the place first described it might be in conflict with prior grants to John Forbes & Co. And this court, enforcing the usages and customs of Spain, on final decree, (p. 468,) in 1834, authorized the other 8,000 to be surveyed at the place indicated in the grant if then vacant.

So, too, in the immense grant in the Fremont case (17 How., 542) no survey preceded it or, indeed, followed it while California remained under the dominion of Mexico, and one of the principal grounds urged by the United States against it (p. 549) was vagueness of description and want of survey. But on the authority of Rutherford vs. Green (2 Wheat., 196) the court held (p. 558): "*The right to so much land, to be afterwards laid off by official authority in the territory described, passed from the Government to him by the execution of the instrument granting it.*"

So, too, in the Sutherland case (19 How., 363) a complete grant was made of "a tract of land known by the name of El Cahou, near the mission of San Diego," not surveyed and the quantity unknown. The United States opposed it also for vagueness, (p. 365,) but this court confirmed it because the description aided by the designo was sufficient to found a survey afterwards, remarking (p. 366) that in the Fremont and Lakin cases (18 How., 557) the vagueness was greater, but that no difficulty could arise in locating the grant by survey.

This latitude is further illustrated in Buyck vs. U. S., (15 Pet., 224,) U. S. vs. Low, (16 Pet., 167,) U. S. vs. Forbes, (15 Pet., 181,) O'Hara vs. U. S., (15 Pet., 275,) and might be shown to run through a great many more cases in which this court has sustained Spanish, French, or Mexican grants on surveys or mere descriptions infinitely less certain than are afforded in the instruments founding the grant to Maurice Conway of 1777. Indeed those instruments have not an element of uncertainty about them if interpreted by the laws and usages founding them, and it was not until 1829 (record in case No. 588, p. 86) that they were questioned at all, and then only by the American surveyors, naturally hostile to large grants and biased in favor of the precise system of their own Government.

The very grant to Conway and Latil of 1774, a complete Spanish patent, shows the usage or custom contended for. The Solicitor General gives it on pp. 22 and 23 of his brief. It issued for lands unsurveyed *in toto*, but its terms severed the thing granted by reference to objects which attached certainty to the grants, as in the Florida and California cases cited. Even the lines of "John the blacksmith" above, and of "Peter the old Acadian," below had never been surveyed, as Andry informs us in his survey of 1776. Nor had even the front been ascertained: for the Indian sale and grant both describe that as "measuring *upwards* of half a league in front." Half a league is 42 arpens. But when *measured* in 1776 by Andry, and the side lines established, the front was ascertained to be 96 *arpens*, or more than a league! Now it is strongly urged the grant of 1777 is void for uncertainty in not having its rear line fixed. The same argument would defeat the grant of 1774, for its rear line was certainly not run, though the fixed depth of 40 arpens was specified in the grant, whereas no depth at all was prescribed for the other short of the limits of the province. When Andry, in September, 1776, proceeded to survey the upper side line of the grants of 1774 and 1777, he tells us he found the posts planted by him on that line in December, 1773, as the lower side line of Francis Duhon, the first set at 37 toises and 2 feet from the river bank, the other at 30 toises further back. The lineal arpent is 30 toises, or 180 French feet. This reveals the then prevailing custom as to surveys in that peculiar region. Yet he tells us, in the preceding part of his certificate, that this land, of which these two posts constituted the lower side line, had, since he planted them, "passed through the hands of several owners." When he went to the lower side line, no posts ever having been set on it, he first "measured the seven arpens, which, by decree of the 27th September" were granted to Michael Chaisson, &c. But how did he do this? Just as, in 1773, he had surveyed the land of Duhon. He set one post at 20 toises from the river, and another 20 toises further. That was sufficient under the custom. Land had no value in first hands. It was to be had for the asking. But to obtain a public surveyor from the capital was expensive. It was generally impracticable in the alluvial regions to run the side lines 40 arpens deep on account of the overflow, swamps or density of vegetation. Even after a century of levees, and drainage and cultivation it is difficult and expensive. In the General Land Office here, and in the Surveyor General's office in New Orleans the old plats of the early French and Spanish surveyors in lower Louisiana may be seen by the hundreds, and seldom or never do they exhibit, in the case of tracts fronting water courses in the alluvial swamps, anything but the length of the front and a few arpens on each side line. All the

other lines are left blank, or simply dotted on the paper. The titles issuing on these surveys do the rest. *They* give the depth, but rarely the quantity. After the establishment of the American Government, and the completion by it of these partial surveys, in order that the residuary domain might be surveyed and sold, the interferences or conflicts were so numerous, Congress was compelled to provide some general remedy, which was done in the closing part of section 3 of the act of 1858.

The uncertainty therefore contended for in the survey and grant of 1777 only addresses itself to a mind trained under a system unknown to the Spanish authorities, who created the title. It is scarcely needed to suggest to this high tribunal that if the decision of 1806 and the confirmation of 1858 determined nothing as to this title, and it must be tried *de novo* under the treaty of 1803, that the usages and customs and the laws of Spain should con rol, and not the laws of the United States founding their precise land system. In the Arredondo case (6 Pet., 691) this Court said: "From a careful examination of the whole legislation of Congress on the subject of the Louisiana and Florida treaties, we cannot entertain a doubt that it has from their beginning been intended that the titles to the land claimed should be settled by the sames rules of construction, law, and evidence in all their newly-acquired territory; *that they have adopted, as the basis of all their acts, the principle that the law of the province in which the land is situated is the law which gives efficacy to the grant, and by which it is to be tested whether it was property at the time the treaties took effect.*"

The "grasping character of the side lines," the "enormous quantity granted as a timber privilege," &c., &c., are epithets resorted to to obscure the true merits or to prejudice the minds of the Court. But all large grants have been thus opposed, notably in the Arredondo and Sutherland cases. In the former the Court said, (6 Peters, p. 718:) "These are good reasons for the jurisdiction being conferred, but the selection of this tribunal for a final and conclusive adjudication on the large claims, affords neither an indication of the intention of Congress, or fur nishes us any reason that in the exercise of that jurisdiction we should consider that the principles of justice, the rules of a court of equity, the law of nations, of treaties, of Congress, or of Spain, the rules of evidence, or the principles of law, can be at all affected by the magnitude of the claim under consideration. *The laws which confer the authority and point to the guides for its exercise, make no such discrimination, and every principle of justice forbids it.*" And in the latter the Court thus rebuked these appeals, (19 How., 365:) "Since this country," (speaking of California,) "has become a part of the United States, these extensive rancho grants, which then had little value, have now become very large and valuable

estates. They have been denounced as "enormous monopolies, princedoms," &c., and this Court has been urged to deny to the grantees what it is assumed the former Governments have too liberally and lavishly granted. This rhetoric might have a just influence when urged to those who have a right to give or refuse. But the United States have bound themselves by treaty to acknowledge and protect all bona fide titles granted by the previous governments; and this Court have no discretion to enlarge or curtail such grants, to suit our own sense of *property*, or defeat just claims, however extensive, by stringent technical rules of construction, to which they were not originally subjected."

The "grasping character of the side lines," supposed to mean their divergency going from the river, did not result from anything contained in Conway's petition, but from the act of the surveyor in running them, according to absolute rule, at right angles to the river bank, and of the Governor in approving such act and founding his grant upon it. Had the river run straight in front of the grant of 1774 its side lines would have been parallel, or nearly so, by the application of the same rule which, by reason of the great bend, now makes them diverge. A moment's reflection will show that any other rule, applied to so tortuous a stream as the lower Mississippi, would soon throw the side lines of all grants at an oblique or obtuse angle with the river.

In Part 2 of Laws, Opinions and Instructions, opposite page 955, will be seen a map showing a number of claims fronting the river immediately below the Conway claim, and nothing can more conclusively show the invariable rule we contend for in the survey of these riparian grants. This map is but a copy of so much of an approved township map of the United States, perpetuating the old Spanish surveys. It clearly proves that divergency, convergency, or parallelism, in the side lines of claims, necessarily is controlled by the inflexible rule that they must be run out, each one on a course *perpendicular* to the river at its point of intersection.

In the 36th Cong., 1st sess., Senate Report Committee No. 150, appears Toombs' Report, and following it a very able argument by Mr. Louis Janin, of the New Orleans bar, against the contemplated repeal of the confirmation. This whole subject is exhausted in that argument, and on pp. 79 to 89 appear a number of depositions by old surveyors, officers, &c., showing the customs and usages we have adverted to. If your Honors will read them they will throw a flood of light on matters not otherwise explicable. We copy that of the late accomplished Surveyor General:

"I, William J. McCulloh, Surveyor General of public lands in the district of Louisiana, solemnly swear it is within my knowledge, derived from frequent reference to the plats, (original or copies filed in this office,) that it was the general custom of the

surveyors employed by the French and Spanish governments, in locating tracts in the province of Louisiana, having a depth of forty arpens, merely to measure the fronts of such tracts, and to indicate the courses of the side lines by planting bournes or posts at equal intervals from each other, at short distances from the river, without actually running and measuring the full depth of such side lines, and without closing the survey by running the rear line between the extremities of such side lines, and that, in tracts having greater depth than forty arpens, or a depth extending to another river, lake, or other natural boundary, it was their custom, *invariably followed*, as far as I can ascertain after careful examination, to measure to the forty arpent points on such side lines, and then, at short distances therefrom, to establish bournes or posts, to exhibit the further prolongation of the side boundaries.

WILLIAM J. McCULLOH,
Surveyor General, Louisiana.

Sworn to and subscribed before me, at Donaldsonville, Louisiana, this 28th day of January, A. D. 1860.

CHARLES S. ILSLEY,
Justice of Peace.

To the same effect is the proof on p. 142 of the record, in No. 588.

The following references show numbers of grants by Spain and France on the same bank of the river as the Houmas grant, a little below it and like it extending to the water boundary of the province:

Claim of John McDonogh & Co. for a tract 32 arpens front "*with a depth extending as far as Lake Maurepas,*" confirmed in full by sec. 1, act of 11th May, 1820, (3 Stats., 573:) see claim No. 406, vol. 2, American State Papers, Public Lands, 254, Green's ed.

Claim of D'Etrepy for a tract of 15 arpens, 11 toises front "*with an extension of depth to the Lake,*": see claim No. 3, same vol. State Papers, 375.

Claim of Piseros for a tract 15 arpens front, "*and a depth extending back to the Lake*": see claim No. 88, same vol. State Papers, 383. These two last claims were reported by the same board which decided and reported the Houmas claims. They have both been surveyed to their full extent as extending from the river to the lake, a greater depth even than the upper side line of Wm. Conway.

Claim of Destrehan for 22 arpens front on the river "*with a depth extending to the lake,*": see claim No. 15, same vol. State Papers, 377, by the old board who reported the Houmas claims:

this claim has been surveyed, as confirmed by the board, with depth from the river to the lake.

Claim of McCutchen for 10 arpens front on river, "*and a depth to the lake*," No. 202, 3d class; vol. 3, State Papers, &c., 594.

Claim of Labranch for 4 arpens front on river "*and a depth to the lake*," No. 203, same report, vol. and page as last claim; also

Claim of Labranch again for 15 arpens front, "*and running back to Lake Pontchartrain*," No. 233, same report, vol. and page 596, as last two claims. All these three claims were confirmed in full by act of 28 February, 1823, (3 Stats., 727,) and have been surveyed accordingly, with long side lines miles in length, extending from the Mississippi to the lake.

And so the list could be extended indefinitely.

Counsel could not have supposed the court would be appealed to to disregard the facts settled seventy-eight years ago by the government's own special tribunal, and to retry all these questions. And hence no proof was adduced below for such a purpose. That tribunal, consisting of three sworn government officers, aided with clerks, translators and a law agent to represent the interests of the Government, sitting in the vicinage, with all the aids derived from living witnesses, intercourse with the Spanish officers, and a presumed familiarity with local usage and custom, settled "all matters respecting such claims," as authorized and required to do by sec. 4, of the act of 1805, among which were the "nature and extent of the claims." for these the claimants were specially required to set forth in their notices. We find they did settle the "nature and extent" of the Wm. Conway claim, and now after the lapse of over three-quarters of a century, in another tribunal, after the loss of the records, the death of witnesses, and all contemporaneous persons, to reopen these settled facts and retry them by different evidence and standards would be to enforce a principle which would leave nothing settled, nothing fixed.

The true question is, has the decision of the commissioners been affirmed by the authority to which alone it was subjected? We contend it has been, and the denial, on which all depends, is founded on the mere fact that the second section of the act of 1858, by naming the three commissioners who at one time constituted the board, intended to reverse the policy of the act of 1805, authorizing a majority to confirm, and to adopt a new one requiring a unanimous decision to support a confirmation. In other words, it is held that although a decision of a majority was competent, as the record in No. 588 abundantly proves, to protect the property from 1806 to 1858, yet then Congress meant to hold it no longer so, and to refuse the relinquishment of the Federal interest unless a unanimous one could be exhibited. This is as much as to say that Congress after declaring to claim-

ants under a treaty, by its legislation of 1805, that two of its commissioners might confirm their rights subject only to its reversal, half a century afterwards it meant to say the claimants should not have relied on the pledge, but should have been prophets, foreseeing that a unanimous decision would alone avail them in the end. Nothing but the plainest language can support such a monstrous doctrine. After fifty-two years of acquiescence in a decision valid by the very terms of the law authorizing any decision at all, by force of which all the sales ignorantly made in violation of it were, in 1836, utterly repudiated as null and void, *ab initio* (record, 88, 107;) after the dissolution of the board pronouncing it, and the death of all the early parties, with their witnesses, the loss of records and papers, for the government to say in 1858, to the then owners of the land, who had dealt on the very faith of such early decision, and on the long acquiescence in it by their Government, that their authors should have done more than the law required, should have produced such ample proof, and adduced such arguments as would have secured a unanimous vote of the board, would be an exhibition of craft and bad faith totally unworthy a civilized State.

What motive could the Congress of 1858 have for reversing the policy of the Congress of 1805? Surely the advocates of this most radical change of policy do not hope to sustain it without any motive and only on the chance use of the names of the commissioners. The laws of Venice might sustain the right to the pound of flesh because "so nominated in the bond," but those of the United States are founded on reason and justice, and that which is not in the spirit of the law, though within the letter, is not in the law. The true sense of the first part of section 2, affirming decisions, is revealed in the proviso to the same section annulling them: "*Provided, however*, That any claim so recommended for confirmation, but which may have been rejected, in whole or in part, by any subsequent *board* of commissioners, be and the same is hereby specially excepted from confirmation." Here the reference is to the subsequent rejection by a *board*, leaving no room to suppose any other decision was meant than such as was competent under the particular law authorizing it to bind the subject-matter. This is too plain for argument, and is not, we believe, denied. But if we are right in this, it must either follow that the defendants are wrong in their construction of the part confirming claims or else that Congress meant one rule for defeating and another for sustaining claims. Such a policy was contended for on the part of the United States under the 8th article of the treaty with Spain of 22d February, 1819, (8 Stats., 258,) which opened with the declaration that "all grants to land made before the 24th January, 1818, * * * *shall be* ratified and confirmed," and closed with the declaration that those made after

that date "*are hereby* declared and agreed to be null and void." In the Arredondo case it was urged against the confirmation by the treaty that it only spoke the language of contract or promise, which until fulfilled by the legislature was not effective. But the court would not sanction such a doctrine, and held (6th Pet., 741,) that as a just nation the United States could not, in treating with Spain, have meant that the same article of a treaty should have an immediate effect in annulling grants, but a future one in confirming them. We commend this just sentiment to those who now hold Congress meant, by the same section of a law, a majority decision sufficient to defeat, but a unanimous one necessary to sustain a claim.

The proviso shows that body looked upon all the favorable decisions within the pages of the book enumerated only as so many recommendations for confirmation, for it says, "any claim so *recommended* for confirmation," &c. What difference did it make, therefore, whether a claim was recommended by two or three commissioners. In either case it was, as against Congress, only a recommendation, and in the one case the merits and facts might be as well laid before that body as in the other. By sec. 6, of the act of 21st April, 1806, (2 Stats., 391), Congress authorized the President, after January 1st, 1807, to reduce the board to one or two commissioners, giving the board, if so reduced, the same powers as before. The reduction was not made. But suppose it had been. Does not the law show that Congress would have deemed recommendations or decisions by the *board* thus reduced as of equal efficacy as before? Would we then have heard that two commissioners were not competent to recommend a claim for confirmation? But that is what is urged now. Congress provided three commissioners for this board, as it did for the California board under the act of March 3d, 1851, (9 Stats., 631), and obviously for the same reason. There could be no mistrial, no tie vote in any case with boards thus constituted. For the same reason this high court, or the court of claims, and many other tribunals, created for temporary purposes, are constituted with uneven numbers of judges.

The construction we contend for is sanctioned by every authority that has dealt with the subject since the act was passed. The joint resolution of March 3d, 1859, (p. 18 of Solicitor General's brief), impliedly assumes the confirmation of the Houmas claims by the second section, for it was only on *confirmations* that any patents could issue. So, too, the first section of the act of 1860 admits the same thing, for it repeals all parts of the act of 1858, "which relate to lands in Louisiana *confirmed by said second section*," and the closing part of the act leaves no room to doubt this repeal was leveled only at the Houmas claims. This is a direct legislative declaration that the second section confirmed the claims. So, too, Toombs' report admits the same thing, for it

urges the repeal of the act because "*It gives the Houmas grantees paramount title to the lands in dispute,*" and requires all adverse claimants to make good their titles by suits at law, &c., (Solicitor's brief, p. 41).

The Land Department, too, beginning with 1859, have uniformly held that the second section confirmed the claims, and all their proceedings go on that hypothesis, and that alone. The Commissioner of the General Land Office so held in his decision of January 11, 1859, (record 68,) and the Secretary of the Interior, in his letter to him of December 10. 1860. at least did not dissent, (record 69); while a subsequent Commissioner on 22d June, 1877, (record, 139), directly so decided, and was sustained on that point by another Secretary on May 4, 1878, (record, 60.) So, too, the Register at New Orleans testified to the confirmation by the second section on the 15th November, 1858, by a certificate he was specially authorized to grant, and which is not appealed from, modified or reversed. (Record, 36). A line of legislative and executive construction of a statute extending over a period of twenty-six years should not be lightly disturbed: "Whenever an act of Congress has by actual decision, or by continued usage and practice, received a construction at the proper department, and that construction has been acted upon for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it." Opinions of Attorney General, vol. 2, 558; also 4th vol., 470, and 10th vol., 55. "Such a construction continuing for twenty years is enough." Barnard vs. Ashley, (18 How., 43 and 45.)

It was urged at the bar that the grant of 1777 was inordinate because the grant of 1774 was small in comparison. Protesting against a defense which evades a direct denial of the right of Spain to grant her lands as she saw fit, but which seeks to prejudice a court by the old appeal against "enormous monopolies and princedoms," we must say that the State of Louisiana is not in a position to urge this infirmity. All her sales, as shown by the schedules on pp. 119, 120, and 121 of the record in suit No. 588, are at the price of 12½ cts. per acre. It is admitted (record, 39) that at least 100,000 acres of the Wm. Conway claim were and are low swamp lands, unfit for cultivation. Hence, if these lands are only worth 12½ cts. per acre now, what were they worth in 1777? The price of the whole front of 96 arpens, with the 40 of depth, paid by Latil & Conway to the Indians, was but $150 in goods. The truth is the rear lands had no value at all then. Principalities and monopolies should be made of better stuff. Besides, the State herself is a mere gratuitous donee under the swamp land grants. What would be her plight had the United States in 1849 avoided the generous policy of Spain in 1777, against which she now protests so vehemently!

The Solicitor General likens these cases to those of Scull, (98

U. S., 419,) and Clamorgan, (101 U. S., 822.) But we protest against the likeness in any particular, and against the inferences contended for. Those were purely speculative titles under which not a foot of soil had ever been possessed or cultivated by any one, nor an act of dominion or improvement done, nor a dollar expended in taxes, nor a line run or measured, nor a *bona fide* transfer made for a price, nor any other thing done on which to found any right, legal or equitable, save the mere written titles founding each. They were merely descriptive grants, whose calls for specific tracts were held so vague and uncertain that no survey could identify either, and on these grounds their confirmations were denied.

On the other hand, the William Conway claim, apart from its essentially different legal aspect, is shown to have been in active occupancy and cultivation for more than a century, with no adverse occupation save that of loggers and wood-men camped in the remote swamps incapable of any other occupancy, and to be now cultivated three miles in depth, with drainage, canals, &c., extending even further. On this property taxes have been paid over a century, and it has been in commerce, passing from citizen to citizen, at high prices, by every species of conveyance known to the law. The front of this claim consists now of three large and very valuable sugar estates, not worth less than a million dollars with the movable property employed in their cultivation; —the sugar houses on all of them, with the costly residences, quarters, mills, granaries, &c., being situated, as shown on the plan in the record in suit No. 587, back of the line of 42 arpens. The same is true, substantially, of the Daniel Clark and the Donaldson & Scott claims, whose fate necessarily hangs upon this case. Their fronts constitute three other large and valuable sugar plantations, though on one of them, the sugar mill is inside the 42 arpen line. One of these sold before the war for a million dollars, including the slaves. There is not one of the three sugar houses on the William Conway claim that, with its machinery, has cost less than $100,000. And such is the title, and such are the facts of the case, the court is appealed to to dispose of on the principles controlling the Scull and Clamorgan cases!

It was thirty years less one, after the State's right to these lands is alleged to have accrued before any human being ever thought of it, and then it was asserted and played on by the outrageous agencies operating her State Land Office, only to afford a cover under which, for a mere song, the lands might be destituted of their timber despite all efforts of the true owners to prevent it. And it was eighteen years after the repeal of 1860 before any officer of the Government ever thought of enforcing it, and then only with a faint heart, (record, 65), impliedly admitting the error.

Respectfully submitted. J. L. BRADFORD,

Att'y for Appellants and Plaintiffs in error.

WASHINGTON, D. C., *January 7th*, 1884.

111-412

Supreme Court of the United States.

OCTOBER TERM, 1883.

Nos, 587, 588, 916 and 917.

ALFRED SLIDELL et als. *versus* GEO. H. GRANDJEAN.	No. 587.
ALFRED SLIDELL et als. *versus* JAMES G. RICHARDSON, State Register, Etc.	No. 588.
ALFRED SLIDELL et als. *versus* THOS. J. EMLER et als.	No. 916.
ALFRED SLIDELL et als. *versus* CHARLES TSCHIRN	No. 917.

Brief of Defendants in the above entitled causes on the question ordered to be reargued.

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The extent of the Houmas grant, as a perfect grant, is the material issue presented for consideration.

It was clearly void for uncertainty, unless the survey of Andry, which was incorporated into the grant, gave it a definite boundary, for neither the application of Conway nor the patent specified the number of acres, or the limits of the concession.

Back concessions, it may be admitted, were usually made only to front proprietors, and generally had a depth of forty arpents; but the regulations of O'Reilly, of 1770, which were continued in force by the ordinances of Gayoso in 1779, required Unzaga and the governors of the several districts in the province to fix the bounds of all grants, both in front and in depth. We must presume, therefore, that this positive law was obeyed in this instance. And upon general principles, independently of these regulations, all grants containing no fixed or ascertainable boundaries, have uniformly been held to be void for uncertainty. Though it may have been customary to grant an additional forty arpents as a back concession, the front proprietor was not entitled to so much as a matter of right, nor could he acquire it by any act of his own. He must in all cases show a grant. Jourdan vs. Barrett, 4 H. 169. And the bounds of the grant must have been fixed, both in front and depth, to be valid.

In case of an open grant resort might be had to usage and custom to determine its extent; but a grant of a definite extent, fixed by a survey, under the positive requirements of law, should not be en-

larged by construction, and no usage or custom has been shown to warrant it.

The express terms of the grant do away with all implied ones on the same subject matter. This is an universal rule in the construction of all written instruments, and is embodied in the maxim, "*Expressum facit cessare tacitum.*". Sheets vs. Sheldon, 7 Wallace 416.

The particular description to be found in the survey, without which the grant would be void, controls the general expressions found in the application of Conway and the patent. The words of grant, no matter how general, must be held to be limited to the particular description contained in the survey.

The extent of the grant must therefore be determined by a proper interpretation of the survey, and here usage is silent.

Let us therefore see what was actually done by Andry under the order of survey. He has certified to his acts very clearly in the return upon which the patent issued. He went to the upper line of the forty arpents of land purchased by Conway of the Houmas Indians, where he found a mulberry tree, planted by him in 1773, at a point 37 toises and 2 feet from the Mississippi river; thence he proceeded to a second mulberry tree, planted one arpent, or 30 toises further back toward the rear; from thence he proceeded on the line of these two trees (first

cutting a road through the woods) until he reached a point forty arpents in depth, where he planted a stake; thence he proceeded two arpents in the same direction, and planted a second stake.

He then went to the lower line, and first measur- off seven arpents which had been granted to Michael Chiasson, September 27th, 1776, and planted a mulberry tree 20 toises from the margin of the river, and a second one 20 toises further back; from thence through the woods, on the same line, until he reached forty arpents in depth, at which point he planted a cypress stake, and two arpents further on, or forty-two arpents from the river, he planted another stake, *to keep the course.* This ended his work.

It will thus be seen that it was only the last stake on the lower line, which was planted to keep the course. Yet it is argued that these words apply to the upper line also, and that they were used to indicate that both lines were to be prolonged in the rear and extended to the utmost limits of the jurisdiction of the governor of the district. But the argument is supported by the survey only as to the lower line, and does not help, the complainants in a solution of the difficulty.

It seems clear, however, that these words, if not mere chance expressions, meant "to keep the course" from the river, for that was the course previously passed over. If Andry had intended other-

wise, as is argued, he would have used the words to point the course into the interior, instead to keep the course, and to comply with the law he should have given his lines a specified depth.

It is argued that a grant of two arpents would have been of no value to Conway, as it did not give him access to the cypress timber, and that the survey should therefore be enlarged, to comply with the supposed interest of the grantee.

While Conway in his application says that the timber may be one league and a half back from the river, he only asked for a grant of what was in the rear, to give him access to it. In other words, he merely desired access to the timber.

According to the regulations of O'Reilly, all grants were limited to forty arpents in depth from the river, and that depth was fixed to enable settlers to have access to the cypress wood, which seems to have been free to them. These grants were extended as the timber was cleared, but always for the purpose of giving access to the public lands from which to obtain fencing, etc.

Now, the certificate of Andry shows that he cut a road through the *woods* in order to reach the terminal points of his survey. We think it clear, therefore, from the certificate of the surveyor, that the grant of these two additional arpents gave Conway what he applied for, which was access to the

public domain, from which to take material for the uses of his plantation.

This is the conclusion expressed by Attorney-General Clifford, in his exhaustive review of the case, over forty years ago.

We find no case which holds that a grant of back lands, void for uncertainty, has been held good to the extent of forty arpents, by construction, under any law, usage or custom; nor where a grant containing limits fixed by the survey has been enlarged by construction. The most that can be said is that the governors of districts were authorized to grant, and usually granted, additional concessions of forty arpents to front proprietors. That they often granted less is not denied, and that they had the power to do so cannot be disputed under any principle of law.

Interpretation cannot do away with the positive terms of a grant. But if doubtful words are used the settled rule of law is to construe them against the grantee and most favorably to the sovereign. Where there is room for argument all uncertainty must be solved against those claiming under a private grant.

Neither in the lower court nor here did complainants put forward a claim for a back concession of forty arpents. They claimed the whole extent of the grant, as set forth in Lafou's map, and denied

that it could be held good for two arpents and void as to the rest.

And it does not appear from the bill in No. 588 that they own any part of the Houmas grant. The stipulation of counsel, relied upon to supply this omission in averment, is merely evidence. "No proof at the trial can make good a declaration which contains no cause of action on the face of it." Rushton vs. Aspinwall, Douglas R., page 683.

No admission in an answer even can lay the foundation for relief, unless the fact admitted be set forth in the bill. Jackson vs. Ashton, 11 Peters 229.

The general rule is that a fact proved but not alleged, shall no more avail a party to a suit than a fact averred but not proved.

It does not appear, therefore, that complainants have an interest in the lands which will be affected by the decision.

Respectfully submittted,

J. D. ROUSE,
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Attorneys for Defendants.

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In the Supreme Court of the United States.

OCTOBER TERM, 1883.

SLIDELL AND OTHERS *vs.* GRANDJEAN. } No. 587.

AND ALSO IN THE THREE OTHER CASES, NOS. 588, 916, *AND* 917.

BRIEF FOR THE UNITED STATES, UPON THE PETITION TO REHEAR, ETC.

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In effect the question thus made is, whether the grant by Galvez extends the original purchase of Maurice Conway to a depth of 80 arpents from the Mississippi.

It is to be observed that the four cases above mentioned are differently situated in regard to such question.

For instance, the records in all of the cases allege that there is no *timber* upon the land in dispute nearer to the Mississippi than one and a half leagues.

Nos. 916 and 917 are suits for trespass committed by

cutting *logs* and getting *shingles*. It is plain, therefore, that these cases concern only such part of the *large* tract claimed by the plaintiffs as is outside of any line set up by the plaintiffs, except that of the river Amite and Lake Maurepas.

The present question, therefore, has no relevancy to the former decision in either "916" or "917."

So in No. 588, which is a bill to enjoin the register of the State land office of Louisiana from delivering deeds for parcels of land within the larger tract, it does not appear that such parcels are within an 80 arpent line. And it is conceded by counsel who make this application, that as matter of fact none of them are within a one and a half league line.

There is then nothing upon the record in No. 588 also, to render the point now under consideration one of any practical importance there.

Apart from the technical defenses (such, I mean, as an entire failure by the plaintiffs to allege a connection of their title with that of Conway, and their admission (p. 9) that since 1829, *i. e.*, for more than fifty-two years before the bringing of this suit, *the United States have maintained and asserted, by sales, &c., their rights as proprietors to all of the land within the Houmas grant back of a forty-two arpents line*), I say, these defenses being laid aside, it appears that the present question has relevancy to the case No. 587; inasmuch as the *locus in quo* of the acts complained of is alleged in the bill to cover the site of "sugar-houses," &c., and so to be within a distance of 80 arpents from the river.

Whilst I again submit that upon the record, viz, bill and demurrer, the plaintiffs are not entitled to a decree, I concede that the claim under the Galvez-Conway grant, as interpreted by subsequent possession and cultivation, may, on behalf of whoever is concerned therein, be good to the extent of the usual double concession, *i. e.*, of 80 arpents in all from the river.

It seems that there has been for nearly a century a silent and steady claim by acts of cultivation to this extent. This possession has no doubt been somewhat disparaged by the continued and somewhat *mala fide* endeavor during eighty years back to obtain countenance therefrom for the enormous pretension which has just been finally disposed of by the court. This circumstance however cannot prevent these acts from having their legitimate operation, including therein an effect in fixing a back line upon the usual grounds of legal argument in such cases.

It seems that to hold that stakes set up *expressly* in order to give *direction* to a line shall be taken as defining its *length* is to do violence to the wills of the actors in the transaction in which the setting up of such stakes was important. The better opinion might be that if, after resorting to the *grant* and to *possession, &c.*, no light is thrown upon the *length* of such lines, they are to be considered as amounting to nothing, and so do not extend the right of the grantee beyond the front concession. Upon the contrary, if the length of those lines is defined by the grant, it may be understood why in Louisiana swamps, a hundred years ago, it was regarded as a sufficient survey of the back concession to establish the *exterior* corners of the front, and then also two points in the line running thence.

A question remains as to the certainty of the lines in the grant by Galvez, either upon the face of the grant itself or so far as this can be rendered certain by serious and bona fide continued action of the parties thereto, reckoning acquiescence also to be action.

If it be conceded that Conway desired to have a concession extending to the "cypress trees," which he represented as being *about* 1½ leagues from the river, there is very little in what was done thereupon by Onzaga or Galvez to show that they assented thereto. These governors do not refer their grant for its definition in this matter to the terms of the application by Conway. That definition is, "*that which may be vacant.*" According to the custom of the colony the 40 arpents behind the front was kept *vacant* for the benefit of the owners of that front. Some presumption arises therefrom that this is what was intended, and this presumption is borne out by the limit of the permanent improvements subsequently made upon the land.

It may well be that Conway's suggestion that the cypress trees were only about 1½ leagues from the river was not assented to by Onzaga. If the grant had been in terms of the application, it would have extended to the cypress trees, even if beyond the distance of a league and a half, *and the back line of the tract would also have conformed to any casual or other irregularity in the line of those trees as then standing,* instead of to the curve of the river on the front. It should appear that the governors assented to that. The presumption from Andry's action is that he did not regard it im-

portant to establish the back line, although he probably would have done this in case the general line of cypresses *as they were then standing* had been understood to constitute it.

Yielding, as seems necessary, upon one side the hypothesis of a 42-arpents back line, and upon the other that of a back line at the Amite and the lake, only two theories as to such line remain probable, *i. e.*, either at *eighty arpents*, or at *cypress trees* supposed to be about 1½ leagues. The general custom of the colony indicates the former as the true line. Admitting the existence of features in the original transaction which somewhat favor the latter, it is submitted that at best these are indistinct, and therefore insufficient to create an exception to a plain general rule. It does not appear that in the one hundred and seven years that have elapsed since the issue of the grant, the grantees have at any time, either by act *in pais*, or by plea in court set up the existence of such a line until the submission of this petition to rehear, and then obviously only as a *pis aller*. This line seems to have been suggested first by officers of the Government about the year 1829, however only as being *one beyond which in any event the claim of Conway could not extend*. About one year since, as appears by the papers filed by the learned counsel in this petition, the Commissioner for the Land Office has endeavored to moderate the larger claim of the plaintiffs, then still in existence, by a similar suggestion. Both of these suggestions, however, in terms set up the lines at the end of *the league and a half precisely, with a course conformed to that*

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vs.
THOMAS J. EMLER, AND ALS., *appellees.*

No. 916. (Standing on bill and general demurrer.)

ALFRED SLIDELL, AND ALS., *plaintiffs in error*,
vs.
CHARLES TSCHIRN, *defendant in error.*

No. 917. (Standing on petition and exceptions.)

Brief for Appellants and Plaintiffs in Error, on Rehearing.

WILLIS DRUMMOND,
ROBT. H. BRADFORD,
COUNSEL.

of the river in front, and not at the *cypress trees, with a course conformed to their line in* 1777, although the latter appears to be the only back line excepting that of 80 arpents that can be deduced from the grant.

Upon the whole matter, it is again submitted that there is not enough in the language of the grant effectually to contradict the force of the general custom of the colony—embarrassed as must be any attempt to arrive at the very intention of the parties to that grant, in the sense now suggested, by the fact that during the lives of all the parties thereto, and for a century after its concession, no such sense was authoritatively claimed or attributed to it.

S. F. PHILLIPS,
Solicitor-General.

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The opinion of this court in these cases, as announced by justice Field on the third of March, 1884, comes to the conclusion that

the whole Houmas title, under which the appellants and plaintiffs in error claim, is perfect for 96 arpens front on the left bank of the Mississippi river, in Ascension parish, Louisiana, by 42 arpens in depth, and that their claims, back of that depth, are public land. The undersigned counsel, who were not originally employed in the cases, filed on the 17th of March, a petition for a rehearing on but two points,—first, that the Houmas title is perfect to the depth of 80 arpens from the river, and second, that the title is perfect to the depth of 1½ leagues or 120 arpens On the 24th of March the court, by justice Field, opened the case for written argument, to be limited to the first point. The undersigned have entire confidence in the soundness of the second point, but yielding to the court, will limit this argument to the first point, which may be justly formulated thus:—

By the laws, usages and customs of Spain, the law of nations, and the treaty between the United States and France of the 30th of April, 1803, Galvez' grant of 21 June, 1777, for a 2d depth, to Maurice Conway, makes the Houmas title perfect for 96 arpens front by 80 arpens deep.

Unzaga's grant of 1 November, 1774, to Maurice Conway and Alexander Latil for the 1st depth, being 96 arpens on the river by 40 deep, is admitted everywhere to be a perfect title. It is similarly admitted that the double concession by Galvez is perfect; and the only doubt now raised by the court is, whether the title is limited to 2 arpens in depth, the extent of Andry's field operations, or whether those operations, and the grant by Galvez as founded on them, make a perfect double concession to the depth of 40 arpens. The latter view is the one which this brief seeks to enforce; and for that end 3 propositions will now be argued.

I. By American authorities, no double concession is less than 40 arpens deep.

II. By colonial authorities, no double concession is less than 40 arpens deep.

III. The facts of these cases consist with the hypothesis that this double concession conforms to the rule of the American and colonial authorities, and is 40 arpens deep.

I. Proposition.

By American authorities, no double concession is less than 40 arpens deep.

The back pre-emption acts grew out of the claims of the inhabitants of the province of Louisiana arising "from a right, or sup-

posed right, to a double or additional concession on the back of grants or concessions;" (statute 21 Ap., 1806, s. 5, II stat., 391;) and these acts all assume 40 arpens as the standard depth of the back pre-emption. (See Michigan acts of 25 Ap., 1808, s. 2, II stat., 502; 23 Ap., 1812, s. 2, *ib.*, 710; 3 March, 1817, III stat., 390; 11 May, 1820, s. 1, *ib.*, 572; 21 Feb., 1823, s. 2, *ib.*, 724: and see Louisiana acts of 15 Feb., 1811, s. 5, II stat., 617; 3 March, 1811, s. 5, *ib.*, 662; 11 May, 1820, s. 7, III stat., 573; 28 Feb., 1823, *ib.*, 729; 15 June, 1832, IV stat., 534, and 24 Feb., 1835, *ib.*, 753.) The U. S mode of resurveying the front concessions, and of surveying the resulting back pre-emptions, is shown on the plat opposite p. 955, Opinions and Instructions. This plat represents T. 11 S., R. 3 E., which adjoins the Houmas lands on their south side. Under the act of 3 March, 1811, s. 2, (2 stat., 662,) nearly all the riparian public lands in Louisiana have also been surveyed into tracts 40 arpens deep. The old colonial usage of granting "what was called a double concession, or forty arpens in depth in the rear of the original concession," was distinctly recognized in congress. (Rept. of H. R. Com. on Pub. Lands, 3 Am. St. Papers, Pub. Lands, 557, Green's ed.)

History, too, recognizes 40 arpens as the universal depth of a double concession. "All the lands on both sides of the Mississippi, from fifty miles below the city to Baton Rouge," said the eminent chief justice Martin, of Louisiana, "had been granted to the depth of forty arpents, or one mile and a half, which is the depth of all original grants. Some had double and others treble grants, that is to say, a depth of eighty or one hundred and twenty arpents. A few grants extended as far as the sea or a lake behind them." (Martin's Hist. of La., 299 and 9, ed. of 1882.)

This view is applied to the Houmas title by the executive department of our government. Surveyor general James P. Turner, in his letter to commissioner George Graham, of 14 Jan., 1829, about the Houmas land, referred to 80 arpens as the depth "which I believe it was designed to have, if found to be vacant;" and the commissioner's reply of 17 Feb., 1829, speaks of 80 arpens as "the usual extent granted, when the front grant was deficient in timber or otherwise." (Sen. doc. 45, 28 cong., 2nd sess., p. 24, 26.) So commissioner Elijah Hayward, on the 9 Jan., 1834, said that French and Spanish double concessions "were almost uniformly confined by these governments, as they now are by the United States, to an additional depth of *forty* arpents, or such other number as would with the *front* tract make an entire depth of eighty arpents." (6 Am. St. Papers, Pub Lands, p. 666, ed. of Gales & Seaton) And the present commissioner, in his report of 10 Oct., 1882, now before the house of representatives, on the claim of John Burnside to part of the Houmas lands, says:

"If the extent of a league and a half did not clearly attach to

the grant in this case as fixing its depth, in accordance with the necessity on account of which it was solicited, being indefinite in its terms, it should undoubtedly be held to be limited to 80 arpents, the usual depth of a double concession." (See p. 19, 20, of printed copy of the commissioner's report, filed with petition for rehearing.)

The courts, also, always assume 40 arpens as the standard depth of a double concession. In Surgett *v.* Lapice, this tribunal, speaking of riparian grants on the lower Mississippi, said, they "almost uniformly extended forty arpens back; to these front grants the Spanish government reserved the back lands to another depth of 40 arpens; and although few if any grants were made of back lands in favor of front proprietors, still they were never granted by the Spanish government to any other proprietor," &c. (8 Howard, 48, 66.) So in Jourdan *v.* Barrett, (4 *ib.*, 169, 182,) involving lands just below the Houmas lands, (see Opinions and Instructions, 955, and plat,) this court, referring to double concessions of back lands, said: "That back lands at all times meant those in the rear between the extended front lines in the rear, to the distance of forty arpents (each line being a straight one throughout), we assume to be undoubted, as a general rule, although there may have been exceptions to it." The late venerable justice Clifford, also, announcing the decision of this court in Dauterive *v.* U. S., a case which relates to back lands near the Houmas claims, recognized 40 arpens as the universal depth of a double concession: "Back conces ions, it seems," said he, "were seldom made, and in no instance of which there appears to be any authentic account, except to the proprietor of the front, and where made uniformly had a depth of forty arpents, reckoning from the rear line of the first concession," &c. (101 U. S., 700, 704.) It is a remarkable fact too, that, although the Houmas lands back of 1½ leagues or 120 arpens have often been in controversy and as often held to be public land, none of the cases question the right of the Houmas claimants to the depth of 80 arpens. (See, for example, Foley *v.* Harrison, 5 La. Annual, 90, affirmed, Foley *v.* Harrison, 15 Howard, 433; Millaudon *v.* Lallande, 5 La. Ann., 438; Laforest *v.* Downing, 16 *ib.*, 301.) Now, it "has been the uniform course of this Court, with respect to the titles to real property, to apply the same rule that we find applied by the state tribunals in like cases." (Waring *v.* Jackson, 1 Peters, 570, 571.)

Indeed, "the additional concession of forty arpents acquired by custom and usage," is allowed to the Houmas claimants, in these words, on p. 17 of the brief of J. D. Rouse and Wm. Grant, for appellee, in Slidell *v.* Richardson, No. 588.

So that the current of the American legislative, historical, executive and judicial authorities, without an eddy to the contrary, establish 40 arpens as the uniform depth of a double concession.

II. PROPOSITION.

BY COLONIAL AUTHORITIES, NO DOUBLE CONCESSION IS LESS THAN 40 ARPENS DEEP.

In the Florida case of Buyck *v.* U. S., 15 Pet., 215, 225, this court said, "We apply to the case, the laws, and ordinances of the government under which the claim originated." Now, usage is law, even under the federal constitution: "Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits." (By McLean, J., in U. S. *v.* Macdaniel, 7 P., 1, 15.) Lord Coke said, *optimus interpres rerum usus.* (2 Inst., 282. And see, Broom's Max., 712.) The same principle obtained in the Spanish colonies. "A legitimate custom has the force of law; derogates the former law that is contrary to it, and interprets the doubtful law;" &c. (1 White's Recop., 360.) Congress has repeatedly prescribed, as the rule for testing colonial Louisiana and Florida grants, *the laws, usages, and customs,* of the parent government. (Acts of 26 March, 1804, s. 14, II stat., 283; 3 March, 1807, s. 8 and 4, *ib.*, 440; 26 May, 1824, s. 1, IV stat., 52; 23 May, 1828, s. 6, *ib.*, 284; 17 June, 1844, V stat., 676.) In the Florida Arredondo grant, which this court confirmed for about 290,000 acres at a time when no survey at all had been made by Spain or the U. S., the court said: "The Court not only may, but are bound to notice and respect general customs and usages as the law of the land, equally with the written law, and, when clearly proved, they will control the general law." (U. S. *v.* Arredondo, 6 Pet., 691, 715.) And in the opinion already rendered by the present bench, in these Houmas cases, the court say, respecting side lines not closed in the rear, that the extent of the tract to be allowed by the court "would necessarily depend upon the customs and regulations prevailing under the Spanish government, which alone could furnish the rule for the surveyor." In fact, the same opinion applies this doctrine to the Houmas title: the court rightly holds that Unzaga's *titulo in forma* of 1 Nov., 1774, is a perfect title to the first concession of 96 by 40 arpens, though the *titulo* is not sustained by any previous survey at all, is a mere descriptive grant, and is not founded on any established rear line. So, the present opinion holds that Galvez' grant of the double concession is a perfect title to the depth of 2 arpens, tho' at the time of the grant neither the front or rear lines of the strip had been measured or marked on the ground.

It follows that colonial usage is the standard by which to try the soundness of the PROPOSITION II above. Fortunately, that usage is uniform and well established, without any variableness

or shadow of turning. It shows that the depth of the front concession, or of the double concession, was never limited to the field operations of the surveyor on the side lines near the front of the concession; that the depth of a double concession was, as those words imply, never less than 40 arpens, tho' often much more; and that the colonial surveyors, by fixing on the ground the direction of the side lines of front or double concessions, merely did so to supply a guide for the future production of the sides towards the rear and the eventual establishment, on the ground, of the back lines at depths of 40, 80, or 120 arpens, &c.

Chief justice Martin says, that "the original grants of land were made of a certain number of arpents (French acres) fronting the stream, *face au fleuve*, with the eventual depth, which was afterwards fixed at forty arpents, and ordinarily carries the grant to a considerable distance into the cypress swamp." (Martin's hist. of La., 9, ed. of 1882.) But the usage referred to above is better illustrated by the evidence in Toombs' report 150, 36th cong., 1st sess., on the Houmas title. In that evidence is the testimony of Louis Bringier, 71 years old, a Louisiana surveyor of 35 years' standing, and state surveyor general. "The side lines," said he, "were surveyed their entire length only, at the request of parties who had to pay for the extra labor imposed on the surveyor, and to clear the road to enable him to proceed." (Toombs' report, p. 89.) Mr. Bringier expressly corroborated the testimony of Mr. D'Hémécourt, which is this:

"I am sixty-six years of age; I am a professional surveyor; have been engaged in the profession for the last forty years, the last twenty-seven of which in Louisiana; I have been well acquainted with the surveys of the old Spanish surveyors, particularly those of Messrs. Laveau Trudeau, Andry, and Lafon. It was the custom of these old surveyors, in surveying a piece of land, not to trace out every line of the tract and run out the side lines to their extreme limits, but simply to establish the front line and run the side lines back two or three arpents, so as simply to establish their proper course and direction." (Toombs' Report, p. 89.) The statements of William J. McCulloh, U. S. surveyor general of Louisiana, and an experienced surveyor of Spanish claims in that State, are to the same effect:

"I cannot conceive with what reason it can be asserted that the establishment by Andry, in the survey of the Conway claim, of posts at the distance of forty-two arpents from the river, restricted it to this depth; for he expressly states that their only purpose was 'in order to keep the course' of the prolongation of the side lines. And this was his frequent custom." (Toombs' report, p. 79.) On the same page, Mr. McCulloh swore "that it was the general custom of the surveyors employed by the French and Spanish governments, in locating tracts in the province of

Louisiana, having a depth of forty arpents, merely to measure the fronts of such tracts, and to indicate the courses of the side lines by planting bornes or posts at equal intervals from each other, and at short distances from the river, without actually running and measuring the full depth of such side lines, and without closing the survey by running the rear line between the extremity of such side lines; and that in tracts having greater depth than forty arpents, or a depth extending to another river, lake, or other natural boundary, it was their custom, *invariably followed*, as far as I can ascertain, after careful examination, to measure the forty arpent points on such side lines, and then at short distances therefrom to establish bornes or posts, to exhibit the further prolongation of the side boundaries."

On p. 80 of Toombs' report, Mr. McCulloh refers to many land claims in which the above custom of partial surveys had been pursued by Andry and other colonial surveyors.

See, too, the lucid testimony of Augustus S. Phelps, *ib.*, p. 87:

"The courses and lengths of the back or rear lines were seldom or never mentioned in the *procés verbal*, and were not often shown upon the face of the plat. The main object with French and Spanish surveyors was to furnish the means of perpetuating and identifying, with great certainty, the boundaries of the front portion of the tract of land surveyed, together with the means of ascertaining, at any future time, the direction of the side lines, giving little attention to the boundaries of the balance of the tract, which, in fact, was, at the time, frequently nearly, if not quite, inaccessible. In order to define and exhibit clearly and minutely their operations, as made on the front of the tract, it was necessary to protract the plat or diagram on so large a scale that the ordinary size of paper used by them generally (foolscap) could only contain the figure of the front portion of the tract, and extending back a few arpents, which was indeed as far, generally, as the marks of the survey on the ground extended." (Toombs' rept., 87.)

Lafon, also, in the great New Orleans Batture case, testified, respecting the side lines of riparian grants in Louisiana, "that the landmarks, which are placed in the beginnings of the said lines, are intended only to show the directions which those lines ought to have;" &c., (2 Am. St. Papers, Pub. Lands, Green's ed., p. 43.) So, in the same case, Don Carlos Trudeau, the Spanish surveyor general of Louisiana and West Florida for 28 years, referred to the posts fixed on the side lines as "being only destined to mark the direction of the limits, or the point of the compass," &c. (*Ib.*)

In the claim of Simon Cucullu, sr., for a back concession of 6 arpens front, between parallel lines, by a depth to lake Borgne, in Louisiana, there was a complete patent for the concession.

Afterwards it was surveyed by Andry, on the 11 Nov. 1777, his survey of the double concession in the Houmas case having been made 1 Oct., 1776. In fixing the boundaries of the Cucullu back concession, he simply ascertained the old lower side line of the front tract, near the Mississippi river, ran 6 arpens up across the front of the tract, planted a post for the upper front corner at one arpent from the river bank, and then running back 1¾ arpens in a direction parallel to the lower side line, planted the second and final post. (See Andry's field notes, 8 Am. St. Pap., Pub. Lands, 346, '7, ed. of Gales & Seaton.) The Cucullu claim is A no. 3, in the rept. of the register and receiver at New Orleans, of 1 Dec., 1835. They recommended its confirmation with depth to the lake, and it was accordingly confirmed by act of 4 July, 1836, VI stat., 852.

The same act also confirmed to Marie Joseph Beaulieu a tract of 3 arpens front on bayou Me airie, near New Orleans, by a depth, between parallel lines, to lake Pontchartrain, claimed under a survey made 14 March, 1796, by the surveyor general, Don Carlos Trudeau. (See claim B 28, in the above report.) Trudeau's entire field operations consisted in measuring across the front, 3 arpens, and in fixing, near the bayou, double posts on each side line, with intervals of a few toises between the posts, in order to settle the courses of the sides. His field notes may be seen in 8 Am. St. Pap., Pub. Lands, 359, ed. of G. and S. The tract is now sec. 124, T. 12 S., R. 11 E., New Orleans land district, La., east of the Mississippi river. The large approved map of the township is in Tube 318, in the draftsman's division of the general land office.

The surveys of Andry and Trudeau, just quoted, are in French and Spanish respectively; but as the present bench of this court contains linguists as well as lawyers, it is not necessary to append here translations of those originals. It suffices to remind the court, that the measures in them are Parisian measures, of which 6 Parisian feet make a toise, 3 toises or 18 feet, a perch, ten perches, or 30 toises, or 180 feet, an arpent, 40 arpens a *profondeur ordinaire*, 80 arpens a double depth, and 120 arpens a treble depth. Eighty arpens are sometimes roughly estimated by Americans as a league, tho' the league of the province of Louisiana was 84 arpens. In U. S. surveys in the State of Louisiana, the arpent is considered to be about 2.91 chains, and 116.36 chains are considered equal to 40 arpens.

Spanish regulations required the surveyor general and his deputies to keep official registers in which to record or copy their plats and certificates of survey. (2 White's Recop., 238, arts. 15 and 16; 3 Am. S. P., Pub. Lands, 629, Green's ed.) Don Carlos Trudeau, a distinguished member of a distinguished family, was surveyor general of Louisiana and West Florida for 28 years. (2 Am. St. Pap., Pub. Lands, 43, Green's ed.) Don Vincente

Sebastian Pintado became his deputy on 1 May, 1796, and succeeded him as surveyor general on 13 Dec., 1805 (2 White's Recop., 338.) Their official registers of surveys, in Spanish, are still in existence, and a number of them have been sent to Washington, from New Orleans, for sale to the general government. They are in good preservation, of unquestioned and unquestionable authenticity, and of inestimable value. Three of these volumes have been borrowed by the undersigned and temporarily deposited with the clerk of the supreme court, for the inspection of the judges, in order to illustrate the usage among colonial surveyors in fixing the side lines of front and double concessions. The books are marked, respectively, Registro B No. 2, Registro C No. 3, and D No. 4. A few of the recorded plats and certificates are signed by Pintado, and the books are known as the Pintado Books; but nearly all the plats and certificates are recorded and signed by surveyor general Trudeau. On folio 1 of Registro B No. 2, he explains the variation of the needle and his system of measurements. On folio 1 of D No. 4, is a beautiful plat and certificate, under his official signature and paraph, illustrating the nature of these registers, the disposition of the original plats and certificates, and, incidentally, the Spanish mode of fixing front and side lines without producing the sides to their legal depth. See, too, folios 2, 2½ and 3, of D No. 4 On folios 8 and 9 of the volume, are plats and certificates of double concessions surveyed by him, showing that his actual operations were confined to fixing posts on the side lines, near the fronts of the double concessions, and that the lengths of the sides, and the courses and lengths of the back lines, were simply calculated. On folio 96 of the same register is a double concession projected by Trudeau, near the Houmas lands, solely by fixing posts, at short distances apart, near the bank of the Mississippi, on the sides of the front concession.

Trudeau, at folio 66 of Register B No. 2, gives a remarkable example of a double concession in which the length of the sides and the position of the back line are not delineated, and the courses of the sides are only fixed by the customary posts set near the front line of the double concession. For other examples of double concessions surveyed by him without extending his field operations to the back lines, see Register C No. 3, folios 38, 58 & 92.

As this court will take *judicial notice* of general Spanish surveying customs, (U. S. *v.* Arredondo, 6 Pet., 691, 715,) and as the judges, in such cases, resort "to such documents of reference as may be at hand," (1 Greenl. Ev., § 6,) the court will doubtless inspect the venerable registers, now submitted, with a view to ascertain, by the custom of Spanish surveyors, what Andry meant by stopping his survey of Maurice Conway's double concession at 2

arpens from its front lines. In East Florida, in West Florida, in Upper Louisiana, and in the dry parts of lower Louisiana, the bounds of preliminary concessions were fixed, (that is to say, posts were planted by the surveyors,) "both in front and depth," as required by art. 12 of O'Reilly's regulations. (2 White's Recop., 230.) But, in granting lands, the governor general, his power being supreme, (Smith *v.* U. S., 10 Pet., 326, 336,) sometimes trusted his subordinates with discretionary power; (Stoddard's Louisiana, 251, ed. of 1812; 6 Am. St Pap., Pub. Lands, 712, ed. of G. & S.;) and severance without survey has often been recognized by this court. (See, for instance, U. S. *v.* Hughes, 13 Howard, 1, 2.) Moreover, Galvez, in approving Andry's survey as he did, (2 White's Recop., 413,) was not fettered by the previous regrulations of O'Reilly. "The laws of O'Reilly did not bind his successors any more than the laws of one legislature bind a succeeding one: Each necessarily possessed a discretionary power over the general regulations of his predecessors, and was at liberty to increase or diminish the privileges bestowed on settlers, provided no infringement was made of the rights secured by anterior grants or concessions." (Stoddard's La., 250, ed. 1812.)

The custom was, in the alluvion of the lower Mississippi, where the rear lands were inundated and valueless, and almost inaccessible, to confine actual surveying operations to the river banks. Surveyors' fees were paid by the grantee, and were governed by custom and the amount of work. (2 White's Recop., 241, art. 30.) In East Florida their pay was $4 a day. (3 Am. S. P., Pub. Lands, 629, Green's ed.) In Upper Louisiana "The cost for surveying a league square was near six hundred dollars." (6 A. S. P., Pub. Lands, 707, ed. of G. and S.; and see *ib.*, 713.) The cost was probably greater in the deep canebrakes and cypress swamps of Lower Louisiana. Hence it is, that in surveying rural riparian tracts on the banks of the Lower Mississippi, Lafon, Andry, Trudeau and other surveyors almost always restricted their field work to the depth of a few arpens. The cultivation of the incipient grants, in such localities, was only required to be extended two arpens deep from the river. (2 White's Recop., 229, art. 2; 235, art. 4.) If the neighboring proprietors, after the survey, wished to extend their clearings further towards the rear, the double, sharpened posts previously fixed by the surveyor on each side line near the stream, enabled them, by their own private, conventional operations, to produce the sides accordingly. But the surveyor himself rarely ran the sides to the 40 arpens point, unless, as in Maurice Conway's case, there was a subsequent grant of a second depth. In such cases the usage was to finish the previous survey of the first depth, by fixing its back corners at 40 arpens from the river, and then to pursue the sides 2 or 3 arpens further back, by way of giving direction to the sides of the double concession.

If the occupancy of the Houmas lands, back of 42 arpens, by the former claimants, had not been justified by Galvez' grant, information would, according to the regulations, have been given to the governor general, and the land improperly usurped by the claimants would have been disposed of as royal lands. (2 White's Recop., 240, 563.)

The rule, therefore, according to the authorities, may be laid down as without exception, that a double concession is always 40 arpens deep, unless the depth is otherwise specifically defined.

III. Proposition.

THE FACTS OF THESE CASES CONSIST WITH THE HYPOTHESIS THAT THIS DOUBLE CONCESSION CONFORMS TO THE RULE OF THE AMERICAN AND COLONIAL AUTHORITIES, AND IS 40 ARPENS DEEP.

The double concession "is limited within what it may reasonably be supposed was intended to be granted;" (P. 17 of brief of Rouse & Grant for appellee in case 588;) and "it is manifest that the petition of Conway and the confirmation, taken together, constitute the best evidence of the extent of the grant." (*Ib.*, p. 31.) And Stoddard, who, as custodian, was familiar with the Spanish land records of Upper Louisiana, says that "The terms of petitions and concessions were drawn with great exactness; and those of the latter corresponded with those of the former; if the first were general, so were the second and so on. (Stoddard's La., 246, ed. of 1812.)

Now the petition for the second depth, the order of survey to Andry, his certificate of survey, and the formal title by Galvez, as reproduced on pp. 23 to 27 of the solicitor general's brief for the U. S. in these 4 suits, (see, too, 2 White's Recop., 415,) will, if construed as liberally and rationally as this court has construed the front concession, show that Conway asked and Galvez granted the land to the depth of at least 80 arpens from the river. Conway's petition did not say absolutely that the land was cleared for a league in depth from the river. He said that his front lands "are totally destitute of fences, and is cleared for upwards of one league in depth," &c. Conway probably meant that the front lands were cleared of their cypress timber, and that he needed a back concession to give him access to the cypress, from which he might otherwise be cut off by future intervening grants to strangers. This was the reason for which these back concessions were usually made. (Am. St. Papers, Pub. Lands, III, 557, Green's ed.) By asking for a double concession of "all the depth which may be vacant behind or at the end of the aforesaid forty arpents of depth," he meant to pray for *all* of the back land to the depth of 80 arpens from the river, provided so much remained vacant and ungranted to others.

Unzaga's decree or order of survey of 27 Sep., 1776, was indorsed

on Conway's petition, and, as it did not criticise or deny any of the terms of the petition, clearly meant to enforce them. The same may be said of Andry's certificate of survey of 1 October, 1776. Said he, "I proceeded to put the petitioner in possession of the depth which, by the aforesaid decree, has been granted to him." At the distance of 2 arpens back from the back corners of the front grant, he planted stakes, not to limit his survey or the second concession to that trifling depth, for that would have been to palter with Conway and Galvez, but "in order to keep the course," as Andry expressed it. If Andry had intended these stakes as corners of the back survey and grant, he would have said so, as he did when establishing the back corners of the front survey and grant. By fixing the stakes at 2 arpens, (equal to 5.82 chains, or less than 132 yds.,) back of those corners, he meant to put Conway in possession to the depth of 2 arpens and much more. But his field operations, alone, are no index to the extent of the back grant. They would have been the same, had Andry designed to put Conway in possession of a total depth of 1½ leagues from the river, or a total depth to the Manchac. There never was in Louisiana a back concession of 2 arpens on a front concession of 40 arpens. The extent of this grant must be deduced from the petition, the order of survey, Andry's certificate, and the grant. The petition, order and certificate have been reviewed. The grant briefly enforces them all. It was issued on the 21 June, 1777. It recites and *approves* Andry's proceedings, which, as has been shown above, left the front and back lines of the second concession unclosed; and then declares: "using of the power to us conferred by the king, we hereby do grant, in his royal name, to the said Maurice Conway the aforesaid land behind or at the end of the forty arpents which contain his plantation, situate in the district of La Fourche, by ninety-six in front on the river, following the same direction which those run," &c. (2 White's Recop., 413.)

It is thus seen that the order of survey, the certificate of survey, and the grant, intend to sustain, not thwart, Conway's petition, which, stating no specific depth, should be construed, according to the authorities heretofore cited, to mean the customary depth of 40 arpens.

The grant to that depth is so clear that it perhaps would never have been questioned, had not the Houmas claimants treated that limitation as subordinate to the greater depth claimed by them under the decision of the old board of commissioners and the act of 2 June, 1858. The government and courts have deemed the second concession vague and indefinite when read as extending to the Manchac; but no fault has ever been found with the concession, in any quarter, to the depth of 80 arpens from the river. This court could therefore now allow that depth without violating any absolute precedent whatever.

The whole Houmas tract would then, in legal comtemplation, be embraced between a broken, back line, 80 arpens from and parallel to the broken meander line of the river front, and would be in mathematical accordance with the grants by Unzaga and Galvez.

The action of secretary Schurz in authorizing public surveys within the Houmas reservation of 1829, is the hand of Esau but the voice of Jacob. It was dictated by the opinion of attorney general Clifford of 31 Dec., 1847. (4 Opinions, 643.) But that opinion was a mere opinion, not a decision. The attorney general, said Mr. Black to the secretary of the navy, "aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes, in order to see better with your own." (Opinion of Jeremiah S. Black, 9 Opin., 32, 36.) The opinion of attorney general Clifford was evoked by a joint resolution, (9 Stat., 110,) whose object was, not the ascertainment of the depth of the Houmas title, but the institution of suits to determine the validity of patents illegally issued, on the 22d of Aug., 1844, upon the Houmas claim of Donaldson and Scott, and that of Daniel Clark. The government wished to know if the patents were illegal; but that question in no wise depends on the extent of the Houmas title, which, accordingly, was left open by the ultimate decision against the patents. The court sustained the attorney general's opinion that the patents had issued illegally, but did not sustain his opinion that the Houmas title terminated at 42 arpens from the river. Nor did the executive, at the time, enforce the opinion as to the limits, by corresponding surveys.

The main question of limits which Mr. Clifford discussed was, whether Andry's survey, 2 arpens deep, carried Galvez grant 15 miles beyond that depth. Mr. Clifford adopted the negative opinion, and he was right. It never was the intention of Andry or Galvez to extend the Houmas lands to the Manchac, though the claimants, necessarily unskilled in colonial land law, were naturally misled, by the generality of the grant, to assume the Manchac as its rear line. What Maurice Conway, Andry and Galvez contemplated, was, a back concession of 40 arpens deep. If the question considered by Mr. Clifford had been, whether the double concession was 2 arpens deep or 40 arpens deep,—whether that concession was a frill, or a skirt, to the body of the front grant, there is no doubt how he would have resolved the question. In fact, his opinion in the Houmas case did, in substance, solve that very question. Said he, back concessions, "where made, uniformly had a depth of forty arpens, reckoning from the rear line of the first concession." (4 Opin., 683.)

Nor can it be doubted how this court, in its first opinion in the

Houmas cases, would have decided, had the alternatives been presented to the court of limiting the double concession to 2 arpens deep, or extending it to the usual depth of 40. For in Dauterive *v.* U. S., (101 U. S., 700, 704,) the court adopted in its opinion the very words above of the attorney general.

The question of severance can scarcely be said to occur in these cases. *Id certum est quod certum reddi potest*, said Coke. (9 Report, 47.) The front of the joint tract of 80 arpens deep, being the river bank, the side lines being fixed on the ground, and the depth being determined by an unvarying custom, the rear line can be surveyed with absolute accuracy. Descriptive grants are familiar to American statutes. A U. S. patent for the S. W. ¼ of the N. E. ¼ of any section, is valid, though not a line or corner of the 40 acres thus conveyed exists on the ground; and a patent for the S. W. ¼ of the N. E. ¼ and the W. ½ of the S. E. ¼, would also be valid, though the tract conveyed would be ¾ of a mile deep by ¼ of a mile wide, without side or rear lines, and with no fixed corner but the S. W. corner.

As the Houmas title is valid to 1½ leagues deep, this effort to obey the court and confine the argument to a depth of 80 arpens, is embarrassing. It is like an attempt to demonstrate that a lustrum is 3 years, or that all the angles of a triangle are equal to one right angle. But it can be proved that a lustrum is at least 3 years, and that all the angles of a triangle are at least one right angle. And so this brief endeavors to show that the Houmas title is at least 80 arpens deep, and that such depth consists with Galvez' grant and is readily and accurately ascertainable on the ground. To that depth it is protected by the law of nations and the Louisiana treaty, (*per* chief justice Marshall, U. S. *v.* Percheman, 7 Pet., 51, 87,) and never was federal property. The truth is, there is not a hostile foot on the reservation of 1829. No trespasses, sales or selections, from any source, have ever occurred within that limit; and although, under the decision of secretary Schurz, a surveyor at one time encroached on the rear lands within the reservation, he has now withdrawn and his work has never been approved. It is not necessary, therefore, to change the decrees already rendered by this court in the Houmas cases. We simply ask that the opinion of the court be so modified as to recognize the Houmas title as a perfect one to the depth of 80 arpens from the Mississippi river.

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8 & F sts. N. W., Washington city,
Monday, 7 Ap., 1884.